Lord HOLLIS HIS REMAINS:

BEING A

Second Letter to a Friend,

Concerning the

JUDICATURE OF THE BISHOPS IN PARLIAMENT,

In the Vindication of what he wrote in his First; and in Answer to a Book since published against it, Entituled, *The Rights of the Bishops to judge in Capital Cases in Parliament*, clear'd, &c.

It contains likewise part of his Intended Answer to a second Tractate, Entituled, *The Grand Question touching the Bishops Right to Vote in Parliament, Stated and Argued.*

To which are added *Considerations*, in Answer to the Learned Author of the *Grand Question*, &c. By another Hand.

And *Reflections* upon some passages in *Mr.* Hunt's *Argument* upon that Subject, *&c.* By a Third.

London, Printed for *R. Janeway*, 1682.

The GENERAL PREFACE.

THE name of the Lord Hollis is so well known, both to the Active, and Contemplative part of Mankind, that no more need be said to recommend any Papers to the World, than to give Assurance that they were his, and by him Designed for the Press.

I am perswaded that most who Read the first of these ensuing Treatises, and have been conversant in that Great Man's Writings, cannot but acknowledge this, for the Genuine product of his large Soul, and close way of Reasoning.

But besides the inward testimony of the thing it self, we have other sufficient

ent proof of its being Authentick, from ſuch as had the Honour of a familiarity with that Extraordinary Perſon *in his life time, to whom he communicated his thoughts on this Subject, as he from time to time committed them to Paper.*

He lived not to finiſh any more of his Anſwer to the Grand Queſtion, &c. *than what is now publiſhed; but often affirmed that he had Conquer'd all the difficulties in it: Nature was ſpent, and all the Oyl of his Vital Lamp was conſumed, before he could advance further with his Pen: And when we conſider that he had paſt the Age of Man, having arrived to his eighty firſt year, and that he ſtill continued Writing for Eternity, when he was upon quitting this Mortal ſtate, we may well ſay that his Life went not out in a Snuff, as moſt very aged men expire; but that he aſcended to Heaven in a bright flame, which ſtill continues to enlighten us that remain here below.*

Surely

Surely I cannot be taxt of impertinence, if I here ſtrew upon his Herſe ſome of Cicero's *happy flowers, ſince one would think they ſprung up now for this very purpoſe,*

Eſt etiam quietæ, & puræ, atque eleganter actæ ætatis placida, ac lenis ſenectus, qualem accepimus **Platonis**, qui uno & octageſimo ætatis anno **Scribens Mortuus** eſt.

Cicero de Senectute. ult. edit. tom. 4. f. 532.

Let no Man ſay that it misbecame him to ſpend his time thus, when he was poſting to Eternity: He had found Truth *to ſtand in need of his Defence, and his own Reputation was called in queſtion upon his appearing for it.*

And next to Devotion, (which without doubt had a due ſhare of his time,) nothing perhaps can give a greater foretaſte of the joys of Heaven, than the ſenſe of a Mans having fully vindicated Truth, *and his own good name.*

The Author of the Conſiderations *is likewiſe a perſon of great Age, and well known for his great Learning: Nor would his Name, if made publick, give any ſmall Reputation to his Book: But he is ſo ſincere a Lover of Truth, that I dare ſay, he would not have any Man byaſt with a previous diſpoſition to believe, that there is more force in his Arguments than he finds, but leaves them to their natural energy.*

For me to pretend to give the Characters of ſuch Authors as theſe two, would be a preſumption beyond what I am guilty of, in putting ſome Papers of mine in the retinue of theirs.

But though my Character cannot do ſufficient Right to either; yet a Confutation of Mr. Hunt's *Errors may be a piece of Juſtice to the* Lord Hollis, *who has been much undervalued by this* warm Author. *And as Mr.* Hunt *is a Man juſtly in Reputation for his Parts and Literature, unleſs it be ſhewn*

that

that his Authority is of no great weight in this ſort of Learning, he might wound by his Cenſure where he doth no great feats with his Argument.

I doubt not but he will pardon my freedom with him, ſince he has uſed as much, or more, with what I have formerly publiſhed to the World. Indeed by his Preface *one would think, that he had wrote before I had ſet out any thing relating to Antiquities: But then he muſt needs have underſtood by way of Prophecy what I would ſay about the* **Curia Regis**, *great part of which he makes uſe of, and concerning the explication of* **King John's Charter**, *and ſeveral other things, which he oppoſes.*

I am ſenſible that enough has been ſaid by the Two learned Authors *(on whoſe Papers mine attend:) to clear the* Queſtion concerning the Biſhops Voting in Capital Caſes in Parliament, *from all the duſt raiſed by Mr.* Hunt.

But he having put things together in another manner than had been done before, ſome might think it requiſite that there ſhould be a particular Anſwer given to every thing of his that bears the face of an Argument, both upon the account of the weight his Aſſertions may carry with many, and the want of Judgement in others, to apply what may be found in theſe Treatiſes *to ſilence all Objections, in how different a manner ſoever they may be repeated. And truly this I had done according to my Talent, but conſidering that thoſe things are wrote for the Learned, whoſe Judgements are too delicate ſoon to reliſh the ſame diſh dreſt over and over again; I thought it convenient to ſuſpend the publication of what has occurr'd to me upon that Subject.*

Nor ſhall I at preſent interpoſe in that Controverſie any further, than to free my ſelf from a two-horned Argument, which I were very dull not to perceive

ceive my ſelf to be concerned in, if not ſolely aim'd at by it.

Having firſt taken a difference between the Great, *or* General Council *of the Nation, to which* Proprietors *of Lands, as ſuch, had right to come, till 49 H.* 3. *And the* **Curia Regis** *compos'd of the Kings immediate Tenants, and Officers; I had occaſion to enquire into the nature of the* **Curia Regis,** *mentioned in the Conſtitution of* Clarendon, *which obliges the Eccleſiaſtick Tenants* in Capite, **intereſſe judiciis Curiæ Regis quouſque perveniatur ad diminutionem membrorum, vel ad mortem.** *This I took to relate to Judgements in the* **Curia Regis**, *as ſuch: And the ground of coming to the* Great, *or* General Council *being different from that of coming to the* **Curia**; *From thence I conceived might be gathered a ſufficient Reaſon, why the Biſhops might have been allow'd*

to

to vote in a Legiſlative Capacity in caſes of Blood: And yet that practice might no ways extend to warrant their ſitting as Judges upon ſuch Cauſes, either when there was a bare **Curia de More,** *or when it ſat within* (a) *the* General Council *of the Kingdom, more than the Suitors at the* **Curia** *being Summon'd.*

Jani Angl. facies nova, *p.* 186.

Ib. *p.* 39.

(*a*) Habet Rex Curiam ſuam in concilio ſuo in Parliamentis ſuis ubi terminatæ ſunt dubitationes judiciorum, & novis injuriis emerſis nova conſtituuntur remedia, & unicuique juſtitia prout meruerit, retribuetur ibidem, *Fleta lib.* 2. *cap.* 2. *The paſſage relating to the conſtituting new remedies muſt needs here relate to the power of the* Magnum concilium, *or* curia *in making Ordinances.* Vid. Jus Angl. ab antiquo. Addit. p. 40.

The Legiſlative power they exerciſed as Members of the General Council *or* Parliament: *And the Judicial power, as Members of the* **Curia,**

Jan. Angl. *p.* 186, 189, 190.

ria, *and were Members of the* **Curia,** *as they held Lands of the King* in Chief: *Whereas Men came to the* Parliament *generally upon the account of property in Land, without conſideration of tenure, ſo it were free. In ſhort, a Man may have that in an extraordinary capacity in* Parliament, *which he has not there in an ordinary. I likewiſe held that* Becket *was try'd for Miſdemeanors only, though according to the Language of thoſe days they were* crimina Læſæ Majeſtatis, *and that the Tryal was in a bare* **Curia Regis,** *when no more than Suitors to that were ſummoned.*

Jan. Angl. &c. p. 201.

Ib. p. 199.

Ib. p. 189.

Mr. Hunt's *Argument upon this follows,*

If it was the **Curia Regis** wherein the ordinary Juſtice of the Nation was adminiſtred,

Mr. *Hunt's* Argument, p. 17.

ſtred, and not the Parliament was intended in the Aſſize of *Clarendon*, in which the priviledge and indulgence under the **quouſque** was allow'd to Biſhops, then the Aſſize of *Clarendon* is unduly urg'd againſt the Biſhops judging in Caſes of Blood in Parliament, &c. And conſequently by the Aſſize of *Clarendon* the Biſhops have no leave to withdraw. If the Court wherein *Thomas Becket* was tryed was the **Curia Regis**, then the Biſhops judging in that Court in that cauſe doth moſt clearly declare (that being a caſe in point) that the **quouſque** was an indulgence which they might uſe or wave.

Now to my thinking, this ſeeming irrefragable Argument has no real force:

Vid. p. 100. & 139 to 166.

Vid. p. 65 to 70, & 172 to 181.

For, not to mention his wrong interpretation of the Conſtitution of Clarendon; *nor yet his*

his miſtake of the Fact in relation to Becket's *Tryal, as if he were Tryed for a Capital Offence: In both which I doubt not but he will receive Conviction to the contrary from theſe two* Learned Authors: *I am bold to ſay, that there is no manner of conſequence in the firſt Branch of his* Dilemma, *which is the only thing that can lye upon me to anſwer: And truly, I conceive, that it by no means follows, that becauſe the* **Curia Regis** *in the* Conſtitution of Clarendon *is not the whole* Parliament, *but only that Court which (either when a* Parliament *was held, or when only a* Council of Tenants in Capite, *or* Lords, *aſſembled) had the ſole exerciſe of the* Judicial Power, *that therefore Judgements in* Parliament *before the Lords, ſuch as were Members of the* **Curia**, *are not affected by that* Conſtitution, *any more than we can now ſay, the* Houſe of Lords *cannot be concerned in any matter*

matter which does not belong to the whole Parliament.

I ſhall only add three Obſervations, which may go far to put an end to this Controverſie.

1. *That part of the* Conſtitution of Clarendon, *which ſays of the* Eccleſiaſtick Tenants in Chief, **Debent intereſſe Judiciis Curiæ Regis quouſque perveniatur ad diminutionem membrorum vel ad mortem**, *was part of the* **avitæ conſuetudines eccleſiaſticæ.**

Dr. *Stillingfleet* ſays, The King inſiſted on the receiving the *Ancient Cuſtomes* of *Clarendon. Anſwer to* Creſſy's *Apol. p.* 100.

If it had been a New Law, then indeed whatever was not expreſly forbidden, were matter of Liberty: But it being only in affirmance of the Ancient Law, *their Liberty went no further than the uſage, which was*

This received over all the Weſtern Church. Burnet's *Hiſtory of the* Reformation. *f.* 101.

to

to be preſent only till ſuch Cauſes came to be tryed.

2. *If* Precedents *are as* Mr. Hunt *cenſures them, like* an Oracle, that will always give a Reſponſe agreeable to the Enquirer and Conſulter; *then we muſt, as I formerly did, look to the Law in the Caſe, without entring into the large Field of Precedents.*

Mr. *Hunt's* Arg *p.* 6.

Jan. Angl. facies nova, *à p.* 186. to 219.

3. *If the Canons require the Biſhops not to concern themſelves in the Tryals of* Capital Cauſes, *and thoſe Canons have been ſufficiently received to become the Law of the Land; which theſe Authors prove undeniably, then the Biſhops muſt ever be ſuppoſed to have been abſent when ſuch matters came in queſtion in* Parliament; *unleſs they are mentioned there by name, and cannot be com-*

Vid. p. 87, 183, 184, *&c.*

comprehended under words common to them with the Temporal Lords, *any more than we can imagine that the Popiſh Lords, who are excluded the Lords Houſe by Act of* Parliament (*yet ſtill are* Peers) *are Parties to any Judgement given by the* Peers *there.*

SIR,

SIR,

THE former trouble I gave you upon this Subject, you pulled upon your ſelf by deſiring my opinion in it; but for this I now give you, I muſt beg your pardon, it being ſingly upon my own account, to do my ſelf right, and juſtifie what I then wrote to you, againſt ſeveral aſperſions caſt upon me in a Pamphlet entituled, *The Right of Biſhops to judge in Capital Caſes in Parliament, &c.* made it ſeems by the ſame perſon, who had ſet out the other Pamphlet intituled, *The Honours of the Spiritual Lords aſſerted, &c.* Of which I gave you ſome account in a Poſtſcript to my former Letter, and I think, without any ſharp reflection either upon that Author or his work. The moſt I ſaid was, When I had inſtanced in three notorious falſifications of his: The firſt is, *p.* 112. where he quotes Mr. *Selden* to prove, That the Spiritualty made their Proxies in Capital Cauſes in more Parliaments than the 21 *R.* 2. for that they did it likewiſe in the 2 *H.* 4. and 2 *H.* 5. which I ſhew was a miſtake, and only ſaid he could not find it ſo in the Record it ſelf, but that he took it upon truſt out of the Margin of

Mr. *Seldens* book of the Priviledges of the Baronage *p.* 125. where there is such a quotation of the 2 *H.* 4. and the 2 *H.* 5. but wholly misapplyed by our Assertor of Honours; for Mr. *Selden* alledges that Precedent to shew, that whereas 2 *H.* 5. it was by the then Earl of *Salisbury* assigned as an error in the Attainder of his Father, (who was condemned of High-Treason in the 2 *H.* 4.) because it was done Sans Assent des Prelates, which are the words of the Record, *Without the Assent of the Prelates* (by the way speaks nothing of Proxies) it was then adjudged to be no error, and his Petition rejected, which in truth is a strong Argument to prove that the Prelates had no right to be present at such Tryals and Judgments, which is the main Question between us. And though he being of another mind, had maintained his opinion by so gross a prevarication, I was so far from retorting it upon him with any bitterness, saying, *It was disingenious, and a suppressing of truth, and not setting things down faithfully*; which is his ordinary language concerning me: Or with insipid jeers, saying, I wear a sharp Sword, a Trenchant Toledo, as one of the younger house of great *Alexander*; and that he brings me to the Sun like *Alexanders* Horse; and telling of the Magical combate in *Apuleius*; and a City of Birds in *Aristophanes*, and such other scurralous passages as his Book is full of; which shews the sweetness of the Gentlemans nature, and the goodness of his cause, which he maintains only by railing and false assertions: Whereas I rather lessened his fault, saying, only

only that he was miſtaken, *by being miſled by the Printers miſplacing the quotation*, ſo excuſing him from any wilful error, and purpoſely venting of untruths.

I do the like in another great falſhood of his in the page following, upon his citing a Record 21 *R.* 2. In the caſe of the Earl of *Arundel*, which he makes to be, *That the Lord Steward by the aſſent of the King, Biſhops and Lords, adjudged the ſaid Earl guilty of Treaſon*; whereas the Record runs, **That the Lord Steward by the commandment of the King and all the Temporal Lords, and Sr.** Thomas Percy, **empowered by the Prelates, and all the Clergy of the Kingdom, judged him guilty, &c.** This you ſee is a foul miſrepreſenting of his Precedent, and impoſing upon the Reader a falſhood inſtead of a true Record, for it ſhews that no Biſhop was perſonally preſent, and I make it out, That the putting of a Layman in their ſteads, is a ſtrong evidence of the incapacity of all Clergy men to be any of them perſonally preſent at any of thoſe Tryals. Yet in this I rather excuſe our bold Aſſertor, ſhewing how he was miſled here likewiſe by Sr. *Robert Cottons* Abridgment; and only add this, *That methinks one ſhould not venture to quote a Record upon any mans allegation without conſulting the Record it ſelf, which*, I ſaid, *I am ſure he had not done*; which I think was as gentle a reprimand as could be, and ſhews, That I ſuppoſed him ſuch a lover of truth, as that if he had known it a falſhood, he would not have made uſe of it, only he was deceived, relying upon the authority of that learned

Antiquary, Sir *Robert Cotton*; but in truth I am now of another mind, and ſee my Gentleman hath a large Conſcience, and a mercenary Pen to publiſh any thing right or wrong to pleaſe thoſe that ſet him on work.

His third notorious falſhood is, The Preſedent, which he cites of *Richard* Earl of *Cambridge*, who he ſaith, 3 *H.* 5. *was tryed in Parliament, upon an accuſation of Treaſon, and found guilty; the Lords Spiritual being perſonally preſent, and bids us ſee the Record of it in the* Tower: To which I only ſay, That he had not done it himſelf, for he would have found it contrary to what he aſſerts; and that the Earl of *Cambridge* was tryed, condemned and executed at *Southampton* by a ſpecial Commiſſion; and that his Attainder was afterwards brought into Parliament, and there confirmed by Act of Parliament, at which the Biſhops might be preſent.

Now I pray you Sir, do you judge if I gave him any occaſion for ſuch a reply as he hath made to me throughout, from the beginning to the end of his Pamphlet: and if he ſhould not firſt have conſidered the Beam in his own eye, and have purged himſelf, and given the world ſatisfaction for theſe groſs miſtakes of his, rather than add more to them as he hath done all along his book, with language fitter for *Billingſgate*, than for the eyes or ears of any ſober man: But I ſee it is the nature of the Beaſt, as the Proverb is, which he cannot help, therefore we muſt take him as he is,

Naturam expellas furca licet, uſque recurret.

And

And now Sir I muſt beſeech you to pardon the trouble I have given you with this long Recapitulation of thoſe his falſhoods in his former Pamphlet: In which I have been the longer to ſet forth the advantage he gave to one that would have fallen foul upon him, and how gently I dealt with him, thereby to juſtifie, or at leaſt ſomething excuſe my ſharpneſs with him now (which I confeſs and am ſorry for) for his baſe return of ſcoffings and railings againſt me, not fit for a Gentleman, who deſerved better at his hands, and gave him not the leaſt provocation for it: But tread upon a Worm, and it will turn again. And ſo I ſhall apply my ſelf to anſwer what he ſaith as to his Arguments in the maintenance of his Aſſertions, which I think will not prove very convincing, and will follow him, as he ſayes he would follow me, ſtep by ſtep, and I hope I ſhall make it appear, that he hath made many a falſe ſtep, and will begin with his Poſtulata's as he calls them, wherein he ſaith we do agree, but he means I think like Dogs and Cats.

His firſt Poſtulatum is concerning the Proteſtation of the Biſhops 11 *R.* 2. Wherein he ſaith we both agree that it is a Law, *But that I have not ſet it down faithfully, leaving out the moſt conſiderable things in it, becauſe they make againſt me*; which if I have done, I am a very bad man, and may paſs not as he ſtiles me for, *One of the younger houſe of great* Alexander, but rather of the houſe of this great Aſſerter himſelf, who is the chief of the family of the Aſſerters of untruths. His charge againſt me is,

for leaving out a paſſage in my recital of this Proteſtation, which is, what they ſay in the beginning of it, and likewiſe towards the end of it, claiming themſelves to be Peers, and that in right of their Peerage by the Laws and Cuſtomes of the Kingdom, they ought to be perſonally preſent in all Parliaments. Then he ſubjoyns another Proteſtation in the 28 *H* 6. which he ſaith alſo I have not cited *faithfully and ingenuouſly, as I ought to have done.* This is a great charge upon me if it be true, that I have done any thing unfaithfully and diſingenuouſly, of which I hope I ſhall be able to purge my ſelf.

And firſt give me leave to make a Proteſtation for my ſelf in the general, which I do upon the faith of a Chriſtian and an honeſt Man, and it is this, That neither in the citing of theſe Records, or any other throughout my Letter to you, I have purpoſely and willingly left out or concealed any thing that I thought material, becauſe it made againſt my opinion: But what I have written is the naked truth as I am fully perſwaded in my Soul and Conſcience, and all that I have done in it hath been ſingly and meerly for the diſcovery of the truth, and the ſatisfying of my ſelf and others, of which I take the ſearcher of all hearts to witneſs; and let our Aſſerter ſay ſo much if he dares, though for venting falſhoods for truths, I find him a daring man.

And now to come to theſe particulars, I will firſt lay before you upon what ground and to what end I urged that Proteſtation of the Biſhops, 11 *R.* 2. It was for two reaſons,

One

One to ſhew, That it being at their deſire enrolled in full Parliament by the aſſent of the King, Lords Temporal and Commons, it came to be the Law of the Land, though it had not been ſo before: The ſecond thing was to ſhew that the Salvo of the Prelates in that Proteſtation extended only to their Right of Sitting in Parliament in other caſes, but not in Caſes of Blood; and that they did not therein at all pretend to that: which I think I very clearly proved in that Letter, to which I refer my ſelf. But for theſe omiſſions which he makes ſo criminal: As for the firſt, concerning my not expreſſing that they made their Peerage a ground of their Proteſtation: I anſwer, That ſince what I conceived and maintained to have been their end in their Proteſtation, which was, Only to aſſert and lay claim to their Right of being preſent in Parliament in all other matters, but matters of Blood, was not at all controverted by me, but that, to which I fully agreed *in omnibus*, I did not think it at all neceſſary nor proper to inſert what moved them to make ſuch a Proteſtation, but only ſo much as was to the purpoſe for what I alledged that Precedent: The matter of their Peerage is another point, for which in truth there is little ground, notwithſtanding all their claim to it; and that it be ſometimes attributed unto them by ſuch as deſire to pleaſe them, and perhaps by many ignorantly and miſlead to it, in regard of their ſitting in the Upper Houſe of Parliament, and having a Parity of Vote with the Temporal Lords in the Legiſlative part, and likewiſe in the judicial part of that Houſe,

in all other Caſes but of Blood, from which they have been particularly debarred both by their own Canon Law, and afterwards by the Law of the Land, and the cuſtome and uſage of Parliament, which may very well make many perſons not conſidering the true nature of Peerage, nor examining with care and diligence what in that particular our Law ſaith, and what hath been the uſage of Parliament, give them that Appellation: But I have in my former Letter cleared alſo this point (I think) very fully, and ſhall ſay more to it in this, when I come to anſwer that Article hereafter in courſe, as our Aſſertor brings me to it, for this now is but by the way upon occaſion of this his firſt Poſtulatum.

And now for his other charge upon my unfaithful citing the Proteſtation in 28 *H.* 6. leaving out how the Lords Spiritual and Temporal joyned in challenging their Right of Judicature, and that the Judgment given by the King concerning the Duke of *Suffolk* ſhould not turn to their prejudice, but they and their Succeſſors ſhould enjoy their liberties in caſe of their Peerage hereafter, as freely and as largely as their Anceſtors had before them: I ſhall give a like anſwer to this as I did to the other, I concealed nothing that was neceſſary and proper to be ſaid, which may appear by my ſetting forth particularly the whole proceeding in that Tryal, ſtep by ſtep, how the Prelates joyned in the management of it, from the beginning to the end; therefore certainly it had been no more a diſadvantage to me to acknowledge that the Prelates claimed ſuch a

Right

Right in a verbal Proteſtation, than that they did actually exerciſe it, as I ſay they did all along in the whole tranſaction of that buſineſs: Therefore if it was deſignedly done, it was a weak deſign in me; my end was only to ſhew the palpable extravagances of that Tryal, and of the Kings taking upon himſelf to give the Judgment, and ſo mentioned the Lords Proteſting againſt it, in which the Prelates joyned with the Temporal Lords, as well as they had in all the foregoing paſſages of it: for the matter of their Peerage, I reſerved it ſtill to be ſpoken to in a clauſe apart by it ſelf, when it comes to be the proper ſubject matter in queſtion, I did it in my former Letter to you, and I ſhall do the ſame in this.

His ſecond Poſtulatum is concerning Attainders, in which he ſaith we both agree that Biſhops may and ought to be preſent, and *yet Attainders*, ſaith he, *are matters of Blood*; *and* learnedly he adds, *That it is not material in the Judgment of any conſidering perſon, which way a mans life is taken away, whether by way of Attainder, or by Impeachment*; and infers further, That the Canon Law, which by a jeer he ſaith, I call the Law of Laws, is not ſo indiſpenſibly obliging. And our Aſſerter it ſeems puts himſelf into the rank of thoſe conſidering perſons, that make an Attainder and an Impeachment two diſtinct ſpecies or kinds of proceeding againſt a Criminal perſon to take away Life, ſaying it is not material which of the two wayes life is taken away, whether by Attainder or Impeachment. Oh the Ignoramus, that wants a conſidering Cap to judge aright

aright and know what an Attainder is, which is what follows upon the Conviction and Condemnation of the guilty Perſon, be it upon an Impeachment in Parliament and Tryal there in a judicial way, or by an Act of Parliament in the Legiſlative way, or by a ſpecial Commiſſion of *Oyer* and *Terminer* under the great Seal; the Attainder is the Reſult and Conſequent of thoſe three wayes of Tryal and Condemnation, and not a diſtinct thing running in a different channel from an Impeachment or from any of the other wayes of Tryal, being the end and conſequent as I ſay of all Tryals, when the perſon is found Guilty. The Term *Attainder* or *Attainted* implies ſo much, which our Etymologiſts derive from the Latin *Attingere*, to Touch or Reach to a thing; Now a Criminal perſon is touched or reached unto, and ſeized upon by the Law, upon an Impeachment and Tryal in Parliament, or by a Tryal out of Parliament by Commiſſion, as well as by an Act of Parliament, ſo I think one may give it this Definition, That it is a Notion in Law, whereby the Law reacheth and ſeiſeth upon a Condemned perſon, taints his Blood and diveſteth him of all his Priviledges both in publick and private concerns, which he enjoyed before as a Free Man of *England*.

Beſides, our confident Aſſerter doth not conſider the nature of the Queſtion in controverſy, which is not, Whether a Biſhop *quatenus* a Biſhop, an Eccleſiaſtical perſon in holy Orders, may be preſent as a Judge in any caſe when matters of Blood are agitated? and whether the Canon

Canon Law be ſo obliging, as that in no caſe he may, but whether by the Law of the Land, and the cuſtome and uſage of Parliament, the Biſhops be forbidden it, when the Houſe of Peers acts in a judicial capacity to condemn any body, and not when they paſs an Act of Parliament for it, and I think it is clearly made out, That they may in the latter caſe, paſſing a Law for it, and not in the former, to act as Judges in a judicial way.

His third Poſtulatum is concerning the Petition of the Commons 21 *R.* 2. That in regard divers Judgments in Parliament had been heretofore undone and repealed, for that the Lords Spiritual were not preſent at them, the King would command them to make ſome their common Procurator with ſufficient authority thereunto; which would put an end to all controverſies: To this he ſaith, That for me to demand what in particular thoſe Judgments were at this diſtance of time, is neither equitable nor rational: And truely I made no ſuch demand, for I do very well know what judgments the Commons did then not intend, which were all Judgments in Capital Caſes; for it is moſt clear by all Records of Parliament, and all the *veſtigia* that remain with us of the uſage and proceedings of antient Parliaments, that there is not the leaſt colour for ſo much as a doubt or a ſuſpition that the Prelates or Lords Spiritual could have any part in thoſe Judgments. And we know on the other ſide, what judgments they had their ſhares in, which were all Judgments in ſuch Civil Cauſes as came into the Parliament, and in Criminal Cauſes

Cauſes that were not Capital, and the Commons then could intend none but theſe, which was enough to ſatisfie me, that this Petition of theirs at that time was no wayes contrary or repugnant to what I maintained. And by the way, methinks it is worth obſervation, the reaſon they give of their deſire that the Biſhops would make a Proctor, not ſo much for that, that their preſence there was of ſo abſolute neceſſity, as that what was done without them was in it ſelf null and void, but *to put an end to all controverſies*; which ſhews the Prelates had expreſſed ſome diſſatisfaction, and had gotten ſome things which had been done in their abſence to be undone and Repealed, which conſidering their power at that time, and how all the Laity was in awe of them, would have a great effect upon mens minds, and make them do what elſe they would not have done, and perhaps ſtrain a point a little to ſatisfie them: And ſtill it ſhews, that notwithſtanding their abſence they were good and valid, till the ſame power that had made them did Repeal them. And to ſhew what an aſcendant the Prelates had over King and Parliament and the whole Kingdom at that time, ſee what they did but the year before 20 *R.* 2. They declared unto the King in open Parliament, *That they were ſworn to the Pope and See of* Rome, *and if any thing were in Parliament attempted in reſtraint of the ſame, they would in no wiſe aſſent thereunto, but would utterly withſtand the ſame*: and can we then wonder, if the Commons were not very loth to diſpleaſe them, and willing to comply with them much rather than have a controverſie

verſie with them, and perhaps be fain at laſt to undo what they had done?

His fourth Poſtulatum is upon the Proteſtation of Viſcount *Beaumont* in the name of the Lords Spiritual and Temporal in the Caſe of *William de Pole* Duke of *Suffolk*, which hath been touched upon before, wherein he now ſaith I have left out the moſt material words; but what they are he expreſſeth not, nor can I imagine what he means; As I have already ſaid, I have been very particular in ſetting down every circumſtance of the whole proceeding, acknowledged the actings of the Prelates in it thoroughout as far forth as the Temporal Lords, and then I ſay, how upon the Kings giving Judgment upon the Duke, that Viſcount in the name of the Lords Spiritual and Temporal made that Proteſtation, *That it ſhould not be nor turn in prejudice nor derogation of them, their heirs, ne of their Succeſſors in time to come.* I think this was ſufficient to ſhew that I did acknowledg all that could be pretended to for the Biſhops Judicature in that buſineſs, and what this Aſſertor would have more, and wherein I have failed I can not imagine, only I ſee he is a quick-ſighted Gentleman and can ſee further into a Milſtone, than another man, and ſpy a fault which another cannot ſee.

He hath a fifth Poſtulatum, to which I can ſay nothing, for I underſtand not what he would be at, he ſpeaks of my accurateneſs in making a diſtinction between the Matter and Form of a Law, and then ſaith, He obſerves three things (though he expreſſeth but two) which he

he ſaith, he ſhall have occaſion to make uſe of hereafter when he comes to ſpeak of the particular Caſes; and I muſt refer my Anſwer to what I ſhall there find, when I believe I ſhall make it appear that he makes no great uſe of them, nor of any other Argument that he brings.

And now I come to the particular Caſes, the firſt is 4 *E.* 3. of *Roger Mortimer* Earl of *March* being then condemned for Treaſon. Here our Aſſerter ſaith, That by 28 *E* 3. upon his Couſin *Roger* of *Wigmore*'s petitioning to have this Judgment and Attainder reverſed, I acknowledg it to be an Attainder, *If I ſay truth, ſay nothing to the purpoſe.* This is gentile language, and which diſcovers my Gentlemans ignorance, as well as his rudeneſs; his ignorance in conceiving an Attainder to be only by a Law, by an Act of Parliament, in which Biſhops may be preſent, and if they were not ſo, but did withdraw, it was their own voluntary act, and no diminution to their Rights: I have already upon his ſecond Poſtulatum handled this point ſo fully, and made I think both his errour and the truth ſo clear, as I need not ſay any thing more to it here.

Then it is a pretty Argument he brings againſt my ſaying, That the Record being, Les queux Counts, Barons & Piers les Articles per eux examinez rebindrent, &c. *Which Earls, Barons and Peers having examined the Articles returned,* &c. It muſt be inferred that the Biſhops cannot be comprehended under the word *Peers*, ſince the Barons are named firſt; To this his Anſwer is, *Well but I find the*

the contrary, *Peers* many times put before Barons, particularly in Mr. *Selden*'s Baronage, *p.* 12. then he cites a Record of the Judgment againſt *John Mautravers*, where it is ſaid, *For which the ſaid Peers of the Land and Judges of Parliament adjudge and award*, &c. Doth this at all contradict my quotation of the Record in *Roger* of *Mortimers* Caſe, but that it is as I ſay, *That the general word* Peers *is there put after the Barons, and being ſo cannot comprehend Biſhops*, becauſe in ſome other Records that word is put before.

He talks of drawing arguments illogically, I am ſure this is ſo. I would put him a Caſe, he brings his Action of Slander againſt one, for that at ſuch a time in ſuch a place he had ſpoken ill of him, and ſaid he was a lying Knave, and other words that will bear an Action, and proves it by witneſs; That man proves by other Witneſſes, That at another time and in another place he had ſpoken very well of him, and ſaid, He was a fine Gentleman; I ask now if he would be ſatisfied with this, and not ſtand upon it, that he had proved his Plaint, and expects a Verdict and Judgment upon it: So may I ſay, that my Precedent ſtands good, and proves what I alledge it for, and what he ſaith, is not to the purpoſe.

But I will go further, and make it appear that even his Precedents that he alledges, make all for me, and againſt himſelf, and though he charges me with not being ſo good as my word, ſaying, That I would run through all the Tryals upon Record, in that I have omitted

ted four in that 4 *E.* 3. I ſhall give you an account of thoſe Tryals in that Parliament, and you will ſee that I could have no ſiniſter end in not mentioning them, and that all of them proved and confirmed my aſſertion, that the Biſhops had no part in any of them. I expreſſed as much as was neceſſary to prove they were not preſent at *Roger de Mortimers* Earl of *March*, who was the chief and the principal of thoſe Delinquents, and whoſe Tryal was the leading Caſe to all the reſt. I give you the words of the Record, how after the exhibiting of the Articles againſt him, the King beſpake the Judges, the Peers who were to judge him, and charged them in theſe words, **Dont le dit Sr. le Roy vous charge Counts, Barons, les Piers de ſon Royalme, que de ſi come ceſt choſes touchent principalement, a lui a vous e a tout le people, &c.** *Therefore our ſaid Lord the King charges you the Earls, Barons, Peers of his Realm, that as theſe things chiefly concern him and you and all the people, &c. You give righteous Judgment.* I ask now if this be not as clear as the Sun at noon-day, that by the words of this Record, *I charge you the Earls, Barons, Peers of the Realm,* (which is the ſame as if he had ſaid, *I charge you Earls and Barons who are the Peers of the Realm*) can be no otherwiſe underſtood, but that only the Earls and Barons are the Peers that are there charged, and none elſe, to give this righteous Judgment: The Earls and Barons are the two *Species*, particularly enumerated, and *Peers* is the *genus* which comprehends both: And the ſame perſons whom the King had ſo charged are they who tryed and

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gave Judgement upon the Earl of *March*, as the Record ſhews it, ſaying, *Les quenx Countes, Barons & Piers*, &c. did judge him guilty of thoſe Treaſons. And the very ſame perſons did give Judgement immediately in that very Parliament upon the reſt, *viz.* Sir *Simon de Bereford*, *John Mautravers*, *Boeges de Bayons*, and the reſt. Therefore my not mentioning their Tryals, which our Aſſertet lays to my charge as a Crime, and a not doing what I had engaged my ſelf to do, which was to run through all the Tryals in thoſe Parliament Rolls, could not be deſignedly done, with an intention to conceal any thing which made againſt me, as it is maliciouſly and very falſely interpreted, for they all made for me, and it was a paſſing over *ſub ſilentio*, of ſo many Precedents that confirmed and fortified what I aſſerted. And ſhould you, Sir, ask me, why I omitted the mentioning of them? I profeſs I could give you no good account of it, but that it was a meer inadvertency.

When the queſtion firſt aroſe about the Judicature of the Biſhops, I took ſome ſhort notes of ſome Copies of Records that I had; and then ſeeing that all thoſe particular Tryals in 4*E*. 3. hung all upon one ſtring, and were managed by the ſame perſons, it ſeems I thought it then ſufficient to ſet down the proceedings in the firſt, which was the rule and foundation of the proceedings in the reſt, and afterwards when I came upon your requeſt, to take a little more pains in making my enquiry into the uſage of ancient Parliaments, I was afterwards more exact in it; but when I wrote my

Letter to you, I made uſe of my notes which I had taken of the firſt Parliament, and particularly of 4 *E.* 3. where theſe other Tryals as I ſay, were left out. But I ſhall now give you an account what they are, and you will ſee it was not for my advantage to conceal them, nor would it have been for our Aſſerters advantage if they had been mentioned; but he quarrels at every thing.

Only give me leave before I come to that, to ſet it down as a general Rule, and a very true one, That wherever there is an enumeration of particulars of ſeveral ranks and degrees, which goes downwards, beginning with the higher and ending with a lower, and in the cloſe, a general expreſſion is of *Others to be added to, and joined with them*, thoſe others muſt not be of a higher rank and a ſuperiour degree to that particular which is laſt mentioned, but either of the ſame degree, or of a lower. This is a judged Caſe even in the buſineſs of Biſhops in *Cokes* ſecond Report in the Arch-biſhop of *Canterbury*'s Caſe, p. 46. **Ad eſte adjuge que Eveſques ne ſont include deins le Statute,** 13 *Eliz. c.* 10. *It hath been adjudged that Biſhops are not included in the Statute* 13 *Eliz. c.* 10. *which ſaith, That Colledges, Deans and Chapters, Parſons Vicars, and then concludes, and* **Others having Spiritual Promotions,** *that theſe laſt words cannot include Biſhops, for reaſons before given, which reaſons are upon the Statute of* 31 H. 8. *concerning the diſſolution of Abbies, which mentioning their coming into the Kings hand, by Renouncing, Relinquiſhing, Forfeiture, Giving up,* &c. and concludes with

with general words, **Or any other means**; *this cannot be understood of an Act of Parliament, which is a higher way of conveyance, than any of those specified.* So Sir *Edward Coke* upon the Statute of *Westminster* the second, *c.* 41. which saith, *Si Abbates, Priores, Custodes Hospitalium & aliarum domorum Religiosarum*, &c. hath this Comment, *Seeing this Act begins with Abbots*, &c. *and concludeth with other Religious Houses, Bishops are not comprehended within this Act, for they are superiour to Abbots*, &c. *and these words,* **Other Religious Houses**, *shall extend to Houses inferiour to them that were mentioned before.* So I conclude, that the Record saying, *Earls and Barons and Peers*, &c. the general words, *And Peers*, can comprehend none but some other Peers, equal only, or inferiour to Barons, and not any above them, as I am sure Bishops will say they are. And I will tell you when those of a higher degree may, and must be comprehended under a general expression, that is, when the Enumeration or Climax (for so I may call it) goes upwards, beginning with a lower Rank, and rising higher in those which they particularize: As if it be said, *Barons, Earls, and all other Peers*; here Marquesses and Dukes will be comprehended, and Bishops also would be, if they were Peers, which they are not; but still I say, if the enumeration descend, none higher than the last mentioned, can be understood to be meant by any general clause.

I think you are satisfied that the E. of *March* was Tryed and Judged only by the Temporal Lords to whom the K. had committed his Try-

al, and charged them only with it. Sir *Simon de Bereford* was the next who was Tryed, and by the ſame Perſons; the Record is **Item en meſme le Parlement ſi chargea noſtre Sur le Roy les dits Countes, Barons & Piers a donner droit & loyal Jugement come affiert a Simon de Bereford, Chevalier,** &c. *Item, in the ſame Parliament our Lord the King charged the ſaid Earls, Barons and Peers to give a right and loyal Judgement upon Sir* Simon de Bereford, *&c.* It follows afterwards, **Si agarderent & adiggerent les dits Countes, Barons & Piers, come Juges du Parlement per aſſent du Roy que le dit Simon come traitre faſt treiſne & pendu.** *So the ſaid Earls, Barons and Peers, as Judges of Parliament, did with the Kings aſſent, award and adjudge Sir* Simon de Bereford *to be Drawn and Hanged.* You ſee the ſame perſons were his Judges, who had before Tryed and Condemned the Earl of *March*; yet I muſt obſerve a little difference in the expreſſions: The King in giving the charge to the Peers in the Earls Caſe, the words of the Record are, The King charges you Earls, Barons, **Les Piers de ſon Royalme,** *The Peers of his Realm*, which muſt be conſtrued, *Who are the Peers*, or *Being the Peers of his Realm*: And then their Judgement comes to be ſet down, the Record ſaith, **Les queux Countes, Barons & Piers,** *&c. The which Earls, Barons, and Peers*, did ſo and ſo, with a Conjunction Copulative [*and*] before Peers, as if there were ſome other Peers after the Earls and Barons; which if there were, we are ſure it could not be the Biſhops, which

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is all that we are to enquire into: We know that heretofore the Kings of *England* did ſometimes ſend Writs of Summons to other perſons, that were not Peers of the Realm, but perſons of Quality, as Bannerets, and ſome Officers, as the Warden of the Cinque-Ports, whom I find commonly to be the laſt ſet down in the Liſt of thoſe who were ſummoned: And thoſe perſons ſo ſummoned, came and attended the Parliament, and had Voice and Vote with the Peers, as Members of their Houſe, and as Peers *pro tempore*, and might be comprized under the general name of Peers, and being Lay-men, might act as Peers in all Tryals, and in all other Judgements of Parliament, both Civil and Criminal, even in Capital Cauſes; but theſe could in no ſort be eſteemed to be Peers of the Realm, though they might paſs in a large acceptation, and a vulgar conſtruction of the expreſſion, be termed Peers in Parliament. Theſe now might be ſummoned to a Parliament, or two or three Parliaments one after another, as pleaſed the King, and then be ſummoned no more, if the King was otherwiſe minded; and they could not pretend to have wrong done them, their former Summons having been *Ex mera gratia*, without any right of theirs to them. So then I may conclude that it is all one, whether you will take it as it is expreſſed in the Kings charge then, *The Earls, Barons, Peers of the* Realm, *&c.* or as it is when they come to give Judgement, and as it is likewiſe expreſſed in the Caſe of Sir *Simon de Bereford*, The ſaid *Earls, Barons and Peers*, &c.

&c. and whether that Conjunction [*and*] before the word *Peers*, be of any ſignification or no, to mark out other Peers ſubſequent to the Barons, is not material to what our Aſſerter would have to be underſtood of my leaving out any thing, for it had all made for me, and againſt him, making it clear enough, that the Biſhops had no part in thoſe Judgements.

The next Precedent is the Judgement of *John Mautravers*, the Record ſays, **Treſtouz les Piers, Countes & Barons, aſſemblez a ceſte Parlement a** Weſtminſter, **ſi ont examine eſtroitement, & ſur ce ſont aſſentuz & accordez que** John Mautravers **eſt culpable**, &c. *All the Peers, Earls and Barons, aſſembled in this Parliament at* Weſtminſter, *have ſtrictly examined, and thereupon have agreed and accorded that* John Mautravers *is guilty*, &c. I appeal now to any man that hath but common ſenſe, if it can be imagined, that the Prelates or Biſhops can be thought to be meant by that expreſſion of *All the Peers*, and if it be not the ſame in ſignification, as when the King charged them to give righteous Judgement upon the Earl of *March*, ſaying, **Si vous charge Countes, Barons, les Piers de mon Roialme**, &c. *And ſo I charge you Earls, Barons, the Peers of my Realm*, &c. There the ſeveral ranks of Peers are firſt named, and the general word, which denotes their Quality, common to both, which makes them competent Judges of thoſe matters, that is, their being Peers is put laſt: And here in this Record concerning *Mautravers* it is put firſt. Which comes all to one.

And

And it is further obſervable, that at the time of that Parliament, there were no Temporal Lords before Earls, neither Dukes nor Marqueſſes: So if any others were to be underſtood to be compriſed under that General Title of Peers, it could be only the Lords Spiritual, which is a thing very ridiculous to believe: Can it be thought, nay can our Aſſerter himſelf think, I trow not, that when the other particular ranks and degrees of the Peerage are expreſſed and ſet down *nominatim* by name (as one may ſay) by Tale and by Token, *Earls and Barons*, that (I ſay) at the ſame time, and to be joyned with them in the ſame action, another rank of men, *viz.* Biſhops muſt paſs under a General Title, and that put in the firſt place, as if Peerage were an *Apellativum κατ' ἐξοχὴν* to them, or a *Genus Imperfectum γένος ἀτελὲς ὄν*, to the two Species, the Lords Spiritual and Lords Temporal, which *Genus* the Logicians define to be *Quod ſpeciebus ſuis non communicatur ex æquo, ſed alteri magis, alteri minus, uni ſpeciei immediatè & propriè, alteri mediatè & in ordine ad primariam*: And that ſo the Lords Spiritual ſhould ſtill be principally and chiefly meant, by the General Name of Peers, they *Primariò*, and the Temporal Lords *Secundariò*. Thoſe Logical expreſſions I know our Aſſerter underſtands well, who blames others for bringing Illogical arguments, therefore I put this to him. But that they are not at all Peers of the Realm, to ſpeak properly and truly, and as they are in the eye of the Law, though they have ſometimes been ſtiled ſo, both by

themſelves and others, I have in my former Letter I think made it clear, and all that our Aſſerter ſaith to the contrary, hath not made me change my opinion, and I ſhall ſay more to it, when I come in courſe to anſwer what is there ſaid by him.

In the mean time I ſhall only add this, which I lay for a ground, that I do verily believe no inſtance can be given of an enumeration of ſome particulars in an Univerſal Collective Propoſition, and to leave out that particular which is firſt in Rank, and ought to be firſt named, if any at all be named, and to have that to be tacitely implied under the General Term, the *Signum Collectivum*, As in this Propoſition, *All the Peers, Earls and Barons, gave ſuch a Judgement*: This I ſay, that if the Biſhops did joyn in the Judgement, it would have been ſo expreſſed, and they would have been firſt named, otherwiſe it is like an *Et cætera* in the beginning of an Enumeration, which in the cloſe, and after an enumeration of ſome particulars, may intimate a joyning of ſome others that are not particularly ſpecified and named, but is never put in the beginning. And I think, I may with confidence affirm, That there is no example in all the Rolls of Parliament, that any of the Benches of the Houſe of Lords hath been particularly mentioned in any buſineſs, and if the Prelates did likewiſe act in it, that they were not alſo particularly mentioned, and always in the firſt place, nay, before any other, even before the Prince of *Wales*, and the Princes of the Blood, as may be ſeen in

the

the Roll 28 *E.* 5. upon *Roger* of *Wygmore's* Petition, the Record ſaith, **Le Roy fit venir devant lui & les Prelatz & Edward ſon fitz eiſne Prince de** Gales, Henri **Duc de** Lancaſtre, **Countes, Barons & Piers le Jugement**, &c. *The King cauſed to be brought before him, and the Prelates, and* Edward *Prince of* Wales *his eldeſt Son, and* Henry *Duke of* Lancaſter, *and the Earls, Barons and Peers, the Judgement*, &c. Now is it probable, or can it be believed, that the Decorum concerning the Biſhops being in thoſe times ſtill ſo punctually obſerved, and that reſpect always given to the Prelacy, whenever they were concerned to mention them particularly and in their due place, that they would in that Parliament of *E.* 3. be content to be comprized under a general notion, and paſs as a man may ſay *Incognito*, when others have more reſpect ſhewed them, to have their names recorded? I do not think that the Clerk of the Parliament durſt have been guilty of ſo great a diſreſpect to them: Therefore we may well conclude, that in this Judgement upon *Mautravers*, the Prelates were not at all ſignified under the general word of **Trestouz les Piers, Countes & Barons**: *All the Peers, Earls and Barons*; nor were they at all preſent, or had any part in that Tryal, no more than in that of *Roger de Mortimer*, Earl of *March*.

The other perſons judged that Parliament, had all the ſame Judges, and paſſed under the ſame Judicature. The Record for *Boeges de Bayons* and *John Deuerell* is, **Item tieu Jugement eſt aſſentiez & accordé que ſoit fait de**

de Boeges de Bayons, John Deuerell put la cauſe ſuſdite, &c. *Item, The ſame Judgement was agreed to, and accorded to be given upon* Boeges de Bayons *and* John Deuerell, *for the cauſe aforeſaid*, &c. The very ſame words are likewiſe for the Judgements upon *Thomas de Gurney*, and *William de Ocle*. And to prove it more authentically that they were all *Ejuſdem farinæ*, of one and the ſame nature, I will give you the Kings Writ that declares them to be ſo, to the Lord Treaſurer, and Barons of the Exchequer, commanding them ſo to inroll thoſe Judgements, and with them a kind of Proteſtation made by thoſe Peers, ſtiled a *Concordia ne trahatur in Conſequentiam*: *An Agreement that it ſhould not be drawn into Conſequence*: That is, Not made a Precedent, to oblige and compel them to judge hereafter any but their Peers, becauſe of the Judgement they had then given againſt Sir *Simon de Bereford*, *John Mautravers*, and the reſt, who were Commoners: For as for thoſe who were their Peers, they could not avoid the Trying of them, particularly in Parliament, where only a Peer of the Realm can be tryed in Parliament time, which hath ever been the priviledge of the Peers; and from which I ſhall in due time and place, before I make an end, draw I think, an Argument not to be anſwered, that the Biſhops are not Peers, for if they be Peers, and queſtioned in Parliament time, they muſt be Tryed in Parliament.

But 4 *E.* 3. *Stephen*, Biſhop of *London*, having been complained of in Parliament for ſaying, That if *Edward* the Second were ſtill alive (as he

he was informed that he was, and in *Corfe*-Caſtle) he would aſſiſt him with all his force, to re-eſtabliſh him in his Throne; was by the Parliament, referred for his Tryal to the Kings Counſel, and by them to the *Kings-Bench*, where putting himſelf *ſuper Patriam*, to be Tryed as all Commoners do, a Jury was empannelled, and the Tryal went on there in the *Kings-Bench*, till at laſt he got the Kings Pardon: This is *Term. Paſc.* 4 *E.* 3. *rot.* 53. Now had the Biſhop been truly and really a Peer of the Realm, neither could the Houſe of Peers have avoided the Trying of him themſelves, nor would he have ſubmitted to a Tryal elſewhere out of Parliament, the Parliament being once poſſeſſed of his Cauſe.

But this is by the by, the Writ for inrolling thoſe Judgements, and the *Concordia* is, *In Memorand. Scaccarii inter Brevia directa Baronibus de Termino Sancti Hillarii Rot.* 33. 5 *E.* 3. In theſe words, **Rex Theſ. & Baronib. ſuis ſalutem. Mittimus vobis ſub pede Sigilli noſtri quædam Judicia in Parliamento noſtro apud Weſtmon. nuper tento per Comites, Barones ac alios Pares regni noſtri ſuper** Rogerum de Mortuo Mari **& quoſdam alios reddita, nec non quandam Concordiam per nos & Pares prædictos, nec non Communitatem Regni noſtri in eodem Parliamento factam ſuper præmiſſis, Mandantes quod Judicia & Concordiam prædicta in Scaccario noſtro prædicto coram vobis legi & publicari & ibidem ſeriatim irrotulari & de cætero ibidem obſervari faciatis, Teſte me ipſo apud** Wyndeſor 15. die

die Februarii, Anno regni noſtri 5. Per ipſum Regem & Concilium. *The King to the Treaſurer and Barons greeting. We ſend you under our Seal, certain Judgements given in our Parliament late at* Weſtminſter, *by the Earls, Barons, and other Peers of our Realm, upon* Roger *of* Mortimer, *and ſome others; alſo an Agreement made in the ſame Parliament by Our Selves, the foreſaid Peers, and the whole Commonalty, concerning the matters aforeſaid; commanding you, that the ſaid Judgements and Agreement you cauſe to be read in your preſence in our Court of the Exchequer, and there to be enrolled in courſe, and duly obſerved. Given under our Teſt at* Windſor, Febr. 15. *in the fifth year of our Reign.* All this ſhews there was no variation in any of thoſe Tryals, but all went on *pari paſſu*, in the ſame Method. And it is not probable there could be any great change in their proceedings, the Parliament continuing together ſo ſhort a time, but fifteen days in all, as Mr. *Pryn* obſerves by the Writs of wages in his fourth Part, which is concerning Parliamentary Writs. And I think I may now ſay, that few will believe I concealed theſe Precedents becauſe they made againſt me. The Caſe of Sir *Thomas Berckley* is of another nature, his Tryal is ſaid to be *Inter Placita Corona tenta coram Domino E. Rege in pleno Parliamento ſuo, &c. Mem. Thomas de Berkeley Miles venit coram Rege in pleno Parliamento ſuo, & allocutus de hoc, &c.* about the murther of *Edward* the Second, and asked how he would be tryed, *Ponit ſe ſuper Patriam*: So twelve Knights were empannelled, who did acquit him.

him. I do not look upon this as a Tryal by the Houſe of Peers, acting in their ordinary Judicial Capacity. There was ſome other Court in thoſe times in time of Parliament, where the Peers probably were the principal Judges, but then were added to them ſome great Officers of the Crown, and of the Judges of *Weſtminſter*-Hall, before whom thoſe Pleas of the Crown were held; I confeſs this is to me *Terra incognita*, a thing of which I can give no very good account. But I think one may affirm with confidence that no Prelates were amongſt them, for they would have been mentioned, if they had been there; as in all Criminal Cauſes which were Capital, or in any thing concerning ſuch Cauſes, I obſerve, they were: And even in this Caſe of Sir *Thomas Berckley* the next Parliament, *N.* 18. it is ſaid, **Item en meſme le Parlement ſi prierent les Prelatz, Countes & Barons**, pour Mr. Thomas de Berkley **a noſtre Sur le Roy qil lui vouſſit deliver de meynprize**, &c. *Item, in the ſame Parliament the Prelates, Earls and Barons beſought the King that he would ſet Sir* Thomas Berkley *at liberty from his Mainprize.* I do obſerve they are always named, and never omitted if any elſe be named, which is my Poſtulatum to our Aſſerter, and not as he injuriouſly would put it upon me, *p.* 56. of his Pamphlet, That I ſhould maintain, That the Prelates are in all Caſes particularly named, or elſe they cannot be thought to be there, and then to diſprove it, quotes a Bill of Subſidy, where the words are, **Les Seigneurs & Communes ſi ſont aſſentez**: *The Lords and Commons have agreed*:

And

And Semble as Seigneurs du Parlement: *It seems to the Lords of Parliament*; and a hundred such instances more, I know, he may give: And the Trifler could not but know that I could intend it of no other but of the matters in question, which were Judgements in Criminal Causes.

And I shall add but this more to shew the improbability of the Prelates of those times being at all employed in Tryals of that nature, and least of all, that we should imagine they could be comprized under general expressions, which if it were, would argue an unquestionable right and title in them to such a Judicature. Let us consider the Statute made but two years before, it is 2 *E.* 3. *c.* 2. which confirms a Statute formerly made 27 *E.* 1. *c.* 3. which Enacts, *That the Justices of Gaol delivery which are sent down into the several Counties, when they enquire of Felonies and Murthers, if one of them be a Clerk, then some discreet Knight of that County shall be associate to him that is the Layman, and shall deliver the Gaol.* We see how careful they were then that no Church-man should take Cognizance of Matters of Blood, Canon Law, Common Law, and Statute Law did prohibit it.

And now to follow my Gentleman to the Parliament 5 *E.* 3. in which he tells me, I have not been fortunate in the choice of my Topick, because that Parliament being called for the redress of the Peace, and the Bishops saying, *It did not properly belong to them to give the King counsel for the keeping of the Peace of the Kingdome*, signified nothing. But had they said

ſaid it did not all belong to them, it had been ſomewhat to the purpoſe. But under this Gentlemans favour, I think it is to the purpoſe, to ſhew that the Biſhops did then believe and acknowledge that it did not properly belong to them to look to the keeping of the Peace, that it was not their proper work, which implies that they conceived their duty and employment to lie another way: And it is a ſtrong argument *à minore*, that if they might not do that, and adviſe the King in doing what was neceſſary for the keeping of the Peace, and puniſhing the breakers of it, much leſs could they be put upon it to judge in Matters of Blood. And for them to ſay that *It did not properly belong to them*, was a little ſofter, and more reſpectful to the King to excuſe themſelves from doing what he required of them for giving their advice, than if they had bluntly ſaid, *That it was not at all of their duty to give ſuch advice*; which had grated a little too much, and had been a kind of retorting it upon the King for requiring a thing in it ſelf improper and unreaſonable. And yet they did as ſtrongly put it off from themſelves, ſaying, *It did not properly belong to them*; for no prudent and ſober man will do a thing that is not proper for him, nor can it be required of him, that he ſhould. So I think my Topick was very good; and I may ſay I am not altogether unfortunate to have to deal with ſo weak and impertinent an Adverſary.

What he ſaith in the Caſe of Sir *John Grey*, and Sir *William de la Zouch*, of Biſhops, that they

they are ſometimes comprehended under the general word of *Les Grantz*, I never denied it; but in that place where the King did charge, **Toutz les Countes, Barons, & autres Grantz en lour foies & ligeances**, &c. *All the Earls, Barons, and other great men*, &c. I ſay that Biſhops cannot be comprehended there, becauſe in that place it can be underſtood but of ſuch great perſons, whoſe Rank is after the Barons, where I am ſure no Clerk of the Parliament durſt ever rank the Prelates. And another Rule which I ſtand upon is, That if any one Bench of the Houſe of Peers be named and ſpecified, as that of Earls or Barons, that of the Biſhops (if the Biſhops were preſent) is never left out, but always firſt placed.

The next ſcratch he gives me, is upon the Caſe of Sir *William Thorp* 25 *E.* 3. upon my inferring, that by the General Term of the *Grantz* in that Parliament, who approved of the Judgement of death given upon *Thorp*, it cannot be ſuppoſed that the Biſhops are underſtood, becauſe they tell the King, that if ſuch a Caſe ſhould happen afterwards, the King might call any of thoſe *Grantz* whom he pleaſed, and by their advice, give ſuch a Judgement of himſelf, which I ſay could not be meant of Biſhops, becauſe it was no employment for them to aſſiſt in Judgements of death. Upon this, my Gentleman is pleaſed in good ſerious earneſt (as he ſcoffingly expreſſes it) to ask, if this be not *petere Principium*, to beg what I am to prove. And I anſwer in true ſerious earneſt, that I do not *petere Principium*,

cipium, not beg the Queſtion; for the Queſtion is firſt general, Whether Biſhops in Parliament can be employed in ſuch Judgements, and then particularly whether among the *Grantz* of that Parliament of 25 *E.* 3. that affirmed that Judgement againſt *Thorp*, there were any Biſhops? And I infer there was none, becauſe they tell the King, that hereafter even out of Parliament, if any body elſe offend in like manner, he may take any of them, that is, of thoſe *Grantz* that now give him this advice, to joyn in condemning him; and by the Law of the Land, a Biſhop could not joyn, therefore there was no Biſhop amongſt them: And that by the Law, Biſhops and all Clergy-men were prohibited, appears by the Act of Parliament of the ſecond of that King which I mentioned before, confirming one to the ſame purpoſe made in *Edward* the Firſt's time, that *No Clerk ſhould be a Juſtice of Gaol-delivery for Tryal of Felons*: this, I think, is not *petere Principium*, to prove the true meaning of what was done at that time in the Houſe of Lords, by what the Law of the Land had already eſtabliſhed, which muſt regulate what the Houſe of Lords then did, and doth ſhew there could be no Biſhops in the number of thoſe *Grantz*.

Then for what he ſaith of the *Commons charging* Michael de la Poole *before the King, Prelates and Lords, which was in* 10 R. 2. *and parallelling his crime to that of Sir* William Thorp, *who for it was condemned to dye; upon which he will infer that* Michael de la Poole *was charged with a Capital crime, and accuſed of*

it by the Commons before the Prelates, as well as before the other Lords, who gave their Judgements upon it. He may examine the Record, and he will find that the Impeachment was only for Misdemeanors, cozening the King in an exchange of Land, when he was Chancellour, and some other miscarriages of that nature: And it is the Impeachment, which is in the nature of an Indictment, that governs the Tryal, be the crime what it will: As it is laid in the Impeachment or the Indictment, it must be so found upon the Tryal, at the least it can be found no higher, less haply it may be: A man that is Indicted for a Misdemeanour, cannot be found Capitally Guilty. And though by a comparison, by way of aggravation, it was likened to *Thorp*'s Case, *Michael de la Poole* made it appear there was no resemblance between them: And who will take pains to read the Record of *Thorp*, which I dare say this Trifler never did, nor scarce any Record; will see that the ground of that Judgement, which made it Capital, was that himself had submitted to such a condition, when he took upon him the Office of Chief Justice; the words are, **Si sembla a eux le Jugement sur ceo rendu resonable depuis qil se obligea mesmes per son serement a tiel penance fil feist alencontre:** *The Judgement given upon it, seemed to them to be agreeing to reason, since he had bound himself by his Oath unto such a punishment, if he did contrary to his Oath.* And I must say, it would go hard with a great many, if every one should be hanged that cozens the King.

And

And it is a pretty remark of his upon Sir *John Lee*'s Caſe 42 *E.* 3. that the Record ſaying, *That he was brought before the Prelates, Dukes, Earls, Barons, and ſome of the Commons*, &c. He obſerves, that if at this Tryal any thing had been objected which had been Capital, the Biſhops were preſent at it: And I ſay he might have made a truer obſervation than that, which is, That they might be well aſſured, that nothing Capital was to be objected, becauſe then the Biſhops would not have been preſent. And one thing I am ſure is obſervable, which is, that the Biſhops, that is, the Prelates are here recorded to be preſent, and to be ranked before the Dukes, Earls, *&c.* We are ſure, if any be ſpecified, they are, and ſtill ranked in the firſt place.

What my Gentleman means, in what he ſaith upon the Tryals 50 *E.* 3. I underſtand not; they are the Caſes of *Richard Lyons*, the Lord *Latimer*, *William Ellis*, the Lord *Nevill*, and *John Peach*, all theſe were only charged with Miſdemeanors; he ſaith their crimes were great and hainous, and reckons the loſs of Forts among them, which he ſaith was a crime Capital in *Gomenitz* and *Weſton*, 1 *R.* 2. and that I acknowledge the Biſhops to have been preſent at thoſe Tryals. But ſtill this learned Gentleman, who brags here that he will not ſuffer the World to be longer amuſed and impoſed upon by my Notions, doth himſelf ſtill miſtake the buſineſs, not well underſtanding the nature of the thing he treats of. Otherwiſe he would conſider that the Tryal

of a Criminal perſon muſt always be purſuant to his Charge; which is a point I have already ſpoken to, therefore I ſhall ſay little here, only this, that the Impeachment of the Commons againſt thoſe perſons, was only for Miſdemeanors, their Tryal was accordingly, and the Biſhops were preſent. And for what he ſaith of *Gomenitz* and *Weſton* was clean another Caſe; it was for betraying thoſe Towns which they had undertaken to keep, when the force upon them was not ſo great: However, it is not material what their Crime would appear to be upon proof, but what their Charge was, and that was Capital. Then for what he adds of the Biſhops being comprehended under the general Apellation of **Les Seigneurs du Parlement**; *The Lords of Parliament*; in ſeveral Caſes which he there cites, which he beats upon over and over again, in ſo many ſeveral places of his Pamphlet, and ſets up like a Man of Straw of his own making, to make ſport with, is what I never denied: my Poſition is, That I have ſtill obſerved in all Tryals of Crimes, when Biſhops could be preſent, it is ſo expreſſed that they were ſo, as in all Crimes not Capital; and I do not think one Inſtance can be given to the contrary. And my other Poſition, which I affirm with more confidence, is, That if any of the other ranks of the Lords be mentioned, the Biſhops are ſo likewiſe, or elſe it is a certain argument that they were not there.

My Gentleman is a little put to his Trumps in the Caſe of *Gomenitz* and *Weſton*, 1 *R.* 2. That is ſo plain, firſt, the Commons coming and

and desiring, That such as had lost Towns and Castles by their own default, might be punished, **Per agard des Seigneurs & Baronage**; *By the Judgement of the Lords and Baronage*: whereupon those Lords commanded *Gomenitz* and *Weston* to be brought before them, and upon a long hearing, condemned them both to death: And the Lords are particularly named, the Duke of *Lancaster* first, and ten more Earls and Barons by name, of whom *Roger* Lord *Clifford* was the last; and then a general clause, **Et plusours autres Seigneurs, Barons & Bannerettes**; *And many other Lords, Barons and Bannerets.* Now this is so plain, and exclusive of all Prelates, as my Gentleman is forced to confess, that it seems doubtful to him who these Lords were, whether the Prelates, or the Lords particularly named; and **plusours autres Seigneurs**, under which (he saith) very probably the Lords Spiritual might be comprised. I see a truth cannot come clearly from him, a thing that is most clear, he makes it doubtful: And one thing he saith most falsely, of a Petition commanded to be read, *Numb.* 29. **En cest Parlement per les Prelates, & Seigneurs, Piers du Parlement**; *By the Prelates, and Lords, Peers of Parliament*; which Petition he will have to be concerning this matter, which is most false. For that which is said *Numb.* 29. is of a Petition, and Writ of Error, presented by *William de Montague*, Earl of *Salisbury*, which was then read, and nothing at all concerning *Gomenitz* and *Weston*; which is a horrible falshood, and imposture of our Asserter

ſerter to abuſe the world ſo, and impoſe upon the Reader. The firſt requeſt of the Commons concerning this buſineſs, and to have this matter examined is *Numb.* 38. and then *Numb.* 39. there is mention of a Schedule given in by *Weſton*, and the Record ſaith, **Ueue & leue la dite cedule en plein Parlement**; *The Schedule being ſeen and read in full Parliament*; and any thing concerning *Weſton* or *Gomenitz* before this, there is not: But ſome falſhood he muſt ſtill add of his own, for the Jeſuites Verſe is very applicable to him,

Verba damus cum noſtra damus, quia fallere noſtrum eſt;
Et cum noſtra damus, nil niſi verba damus.

And indeed throughout his whole Pamphlet he doth but *Verba dare*, take *Verba*, *Words*, as in oppoſition to reality and truth, for it is full of falſhoods; or take Words in oppoſition to matter and good ſenſe, for his whole Book is a very bundle of words, without any good matter in it. But one thing more I cannot but obſerve, it is his inſiſting ſo much upon a thing, which I am confident himſelf doth not believe, though I have known a teller of ſtories tell one of his own invention ſo often, that at laſt himſelf hath begun to believe it to be a truth: It is, that after the naming ſeveral Lords, and ending with ſome Barons, there is a general expreſſion, **Et pluſours autres Seigneurs, Barons & Banerettes**; *And many other Lords, Barons and Bannerets*; my confident Gentleman hath the boldneſs to add, *Under which probably the Lords* con-

Spiritual might be comprised; which he knows the Prelates of thoſe times, if they had been concerned in it, would never have endured, and the Clerk of the Parliament would as ſoon have eaten Fire, as have entered it ſo.

Then in the Caſe of the Murtherers of *John Imperial*, a publick Miniſter, 3 *R.* 2. becauſe I obſerve, that it is expreſſed in the Parliament-Roll, that the Biſhops were not preſent at the framing of the Act to make it Treaſon in them, which I grant, in other places of my Letter they might have been, being to paſs an Act of Parliament in a Legiſlative way, my Gentleman is pleaſed to ſay, *That I forget my ſelf*: In truth No, I did ſuppoſe it, and do ſuppoſe it to be a good Argument *à minore*, to ſhew that the Prelates were then ſo modeſt, as to withdraw upon the paſſing of a Law for the greater puniſhment of ſuch a Capital Crime, which in ſtrictneſs perhaps they did not need to have done, much more then would they avoid the ſitting as Judges to take away life in a judicial way, which they could no ways pretend to: But my Gentleman loves to quarrel, and ſcribble Paper, though to no purpoſe.

To the Caſe of Sir *Ralph Ferrers*, 4 *R.* 2. he only ſings over his tedious plain Song, That under the general word of *Lords of Parliament*, Biſhops may be comprehended, and therefore he will have it, That they muſt be ſo: And much good may it do him with his *Crambe bis cocta*, I may ſay *centies cocta*, for I think he ſerves up this ſame diſh a hundred times in this his learned Treatiſe.

But I may not let paſs what he ſaith upon the Caſe of the Biſhop of *Norwich*, 7 *R.* 2. how extream falſly he recites things, taking all upon truſt, how this man or t'other man cites a Record, but never ſeeing the Record it ſelf, which perhaps he cannot ſo much as read. He deſires it may be taken notice of, that for thoſe Miſdemeanors he was adjudged to make Fine and Ranſome to the King, and that the Judgement was paſſed upon him *by the Lords by aſſent of Parliament*; where he ſaith, he hopes I will not deny but that there were Biſhops preſent, and for this ſends me to *Cotton*'s Abridgement, 7 *R.* 2. *n.* 23. but if he would have looked upon the Parliament Roll he would have found this, **Perquoy del aſſent des Countes, Barons & autres Seigneurs Temporelz preſentz en ce Parlement eſt aſſentuz & accordez que vous ſoiez en la merci le Roy, & mis au fin & raunceon pur voſtre malfait ſolonc la quantitée & qualitée dicell**: *Therefore by the aſſent of the Earls, Barons, and other Lords Temporal preſent in this Parliament, it is agreed and accorded, that you ſhall be at the Kings mercy, and put to Fine and Ranſome, for your miſdeeds, according to its quantity and quality.* You ſee now how this man would impoſe upon us, and what ſtuff he brings to make good his aſſertion: If I had been guilty of ſuch a falſhood, I ſhould have heard of it to purpoſe, that both my ears would have rung again; and no Ink this Gentleman could have got black enough to ſet it out in its colours.

Then

Then he comes to the Caſe of *Michael de la Poole*, 10 *R.* 2 where he ſaith the ſame things he did before, and which I have already anſwered, ſo to that I refer you.

The next is the 11 *R.* 2. where the Prelates withdrawing from Parliament, by reaſon of matters of blood, which were then to come into agitation, enter a Proteſtation with a *Salvo* to their right of ſitting in Parment, which my Gentleman will have to be meant even of their being preſent at the agitation of thoſe matters, if they were ſo pleaſed. This hath been treated of before at large already, to which I refer you; I will only obſerve this further at preſent, out of the words of their Proteſtation, firſt, they ſay, Quia in præſenti Parliamento agitur de nonnullis materiis, in quibus non licet nobis aut alicui eorum jurta Sacrorum Canonum inſtituta quomodolibet perſonaliter intereſſe, ea propter pro nobis & eorum quolibet proteſtamur, & eorum quilibet hic præſens etiam proteſtatur, quod non intendimus nec volumus ſicuti de jure non poſſumus nec debemus, nec intendit, nec vult aliquis eorum dum de hujuſmodi materiis agitur vel agetur, quomodolibet intereſſe, ſed nos & eorum quemlibet in ea Parte penitus abſentare: This they declare, *That it is not lawful for them, nor any of them, by the inſtitutions of the Holy Canons, to be perſonally preſent, and that of Right they cannot, nor ought to be there, and therefore they do not intend in any ſort,* quomodolibet, *to be preſent, but wholly to abſent themſelves, while thoſe matters are handling.* Can any man now have

have the fore-head to maintain, that they could have a thought of challenging ſtill a right, contrary to ſuch prohibitions, and to ſay, that it was only the Canon Law that did prohibit them: I ſay ſtill that the Canon Law was to them above all Laws, and the Prelates of thoſe times conceived themſelves to be above all other Laws; even not to be ſubject to them, but what the Canon Law did allow or forbid, was accordingly by them held to be moſt lawful or unlawful. The Salvo they add, makes it clear, **Jure paritatis noſtræ & cujuſlibet eorum intereſſendi in dicto Parliamento, quoad omnia & ſingula inibi exercenda noſtris & eorum cujuſlibet Statui & Ordini congruentia in omnibus ſalvis**; *The right of our Parity, and of every one of them* (that is, our equal right in the general, and of every one of us in particular, with the reſt of the Lords) *of being preſent and acting in the ſaid Parliament, as to all things and every thing befitting our State and Order, always remaining unto us ſafe and entire.* Now I would ask, if it can be imagined, that they would, by way of Proteſtation, reſerve to themſelves a liberty (when they pleaſed) to do what they ſaid was not lawful for them to do, and that which of right, and according to the Law to which they were ſubject and muſt obey, they could not, nor ought to meddle with? And if ſuch things can be thought to be *Statui & Ordini congruentia*, for their Salvo extends only to ſuch things as are agreeable to their State and Order. Indeed, I think it a ſolecism to have ſuch a thought. And I know it will be excepted

excepted againſt, that I do take *Paritas* here in ſuch a ſenſe, and not to be *Nomen Apellativum*, to ſignifie *Peerage*, a rank of men; but I conſider how it is put, that it is *Paritas intereſſendi in Parliamento*, which in my opinion is proper to render a *Parity, or an equal right with others*, to be preſent in Parliament. But let them conſtrue it Peerage, it matters not to me, I have handled that point fully by it ſelf in my former Letter, and ſhall do it again in this before I make an end, to ſhew I am not afraid of that expreſſion; and though in thoſe times the Prelates gave themſelves ſometimes that Character, that it did not at all belong unto them. And he beats upon this again, That this was left out purpoſely by me in my citing this Proteſtation, which I have ſufficiently cleared already amongſt his Poſtulata's, therefore I ſhall not trouble you with it again in this place.

In the Caſe of *Thomas Haxey*, 20 *R.* 2. my Gentleman is ſo ingenious, as to ſay, He believes the Biſhops were not preſent, but then he tells you why; becauſe it was an erroneous Judgment, and an Irregular Condemnation, and ſo commends their Prudence: And ſure, he hath been with ſome Witch to raiſe ſome of thoſe Prelates from the Grave, as the Witch of *Endor* did *Samuel*, to tell him the true cauſe why they withdrew themſelves, and did then forbear to uſe their Right, as he ſaith it is lawful for every man to do, elſe he could never have hit ſo pat upon the true cauſe of their withdrawing, whereas otherwiſe a man might ſay it was becauſe they knew they had no right to

be

be there; and if it had been their right, they ſhould the rather have made uſe of it, to prevent and hinder an unrighteous Judgement, and have cauſed a righteous one to be given. And more than that, if it was their Right, and that they had a calling to be there, they were bound to attend the Service, and I think it would have been a breach of Duty, and a Sin in them to withdraw themſelves from it.

And now I come to a *Bundle of Words* indeed, it is what he ſays concerning their Proxies, 21 *R.* 2. out of which one ſhall have much ado to pick ſome ſenſe, and what it is he would be at, I will do my endeavour in it. He firſt puts us in mind of his fifth Poſtulatum, and of what he ſaid there of the difference between the Matter of a Law, and the Manner of its enacting, and that a Law may be repealed for the Matter of it, and yet the Manner of making it ſtill hold good. This I ſuppoſe he ſaith, becauſe I except againſt the authority which that Parliament, at the deſire of the Commons, gave the Biſhops to make their Common Procurator, in regard that whole Parliament was afterwards repealed, and conſequently all it did, made null and void. Yes, ſaith he, the Parliament was repealed by 1 *H.* 4. becauſe it condemned thoſe who were his friends, as Traytors to the King and Government; yet the proceedings in that Parliament were juſt and lawful. To which I anſwer, That what was done that Parliament, agreeing with the practice and uſage of other Parliaments, was certainly

certainly juſt for the Manner of the doing, though the Matter might be repealed, and made null: But what was never done before in any Parliament, nor any thing like it, could not receive any ſtamp of Authority for its being done in this Parliament, becauſe the Parliament it ſelf had no authority, a ſubſequent Parliament repealing it, and making it as if it had never been: And this of all the Biſhops joyning to make a Common Proctor was never done in any Parliament before nor ſince.

If any ſhould object, that *Henry* the Fourth was an Uſurper, and had no right nor Title to repeal former Parliaments, nor to make any Laws. This were an Objection if it ſhould be allowed, would have a long tail, and carry a very bad conſequence, for it would ſweep away at once all the good Laws that were made in three Kings raigns, and would make ſuch a *Hiatus* in our Statute Laws, as would put things into a very great diſorder. We know that in *Edward* the Fourth's time, which followed immediately after thoſe three *Henries*, in all the Acts of Parliament which paſſed, when mention is made of any thing done in thoſe Kings Reigns, ſtill what was done is allowed of, and confirmed, and to their Perſons and Government, the Parliament ſtill gives this Character, that they were Kings indeed, but not of right. Which implies the ſtamp of Soveraign power and authority to be ſet upon all their actions, and ſo upon the Parliaments that were ſummoned and held by them, and principally there, becauſe

of

of the concurrence and conjunction of the whole Kingdome in all things there done. Nay, in ſome Acts of Parliament we find care taken, that nothing ſhould claſh with what had been done in Parliament by ſome of thoſe Kings, as 14 *E.* 4. *c.* 4. there is a Statute concerning Breakers of Truce, and a Proviſo in it, *That this Act ſhall not extend to any Act or Ordinance made* 2 H. 5. *late indeed, and not of right, King of* England. But ſtill he is acknowledged King of *England*, *de facto*, which goes a great way to authorize any thing done under their power. Therefore 11 *H.* 7. *c.* 1. A Law is provided to indemnifie all perſons that ſhall do ſervice to the King in being, whether he have right or no.

As for what is ſaid of the Biſhops making their Common Proxy, at the prayer of the Houſe of Commons, *That their Proceedings might be valid, and not queſtioned in future Parliaments by reaſon of their abſence, and that divers Judgements had been reverſed, becauſe they were not preſent.* It is true, it is ſo expreſſed in the Roll of that void Parliament, which as it hath no authority nor validity in it ſelf, ſo it is very ſtrange, that if there had been ground for this apprehenſion, there ſhould remain nothing upon Record in all the Rolls of Parliament, that ever any Judgement, or any other act done in any Parliament had been ſo repealed. We know it was once attempted 2 *H.* 5. by *Thomas Montacute*, Earl of *Salisbury* (as I told you in my former Letter) who brought his Writ of Error to reverſe

verſe the Judgement given againſt his Father 2 *H.* 4. becauſe the Biſhops (as he alledges there) being Peers of Parliament, were not parties to that Judgement, but it was declared to be no Error, and his Petition was rejected. And we know that in *Edward* the Firſt's time, there was a Parliament held at *St. Edmonds-bury*, *Clero excluſo*, not a Prelate admitted to it. And in *Henry* the Eighth's time all the Judges of *England* declared it for Law, *That the King might hold a Parliament with his Lords Temporal and Commons, altogether without the Lords Spiritual.* Tout ſans les Spirituels Seigneurs, it is in *Keilwayes* Reports, in Dr. *Standiſh*'s Caſe. Therefore there is no reaſon to think, that any Judgements were repealed upon the Biſhops being abſent, ſeeing their preſence is not of neceſſity for the conſtituting and ſitting of a Parliament. And eſpecially not for the Judgements which we treat of in Capital Caſes, becauſe by what appears upon Record, and by all the Laws, Canon, Common and Statute Law, they never were preſent, I always except that Unparliamentary Extravagant Proceeding and Judgement of *Henry* the Sixth, in the twenty eighth of his Reign, upon *William de la Pool.*

Our Aſſerter tells us of ſome Judgements reverſed 15 *E.* 2. particularly in the Caſe of the *Spencers*, but he doth not tell us where he finds it, nor I believe, doth he know himſelf, having only taken it up ſome where upon truſt, as he doth other things. But in this 21 *R.* 2. upon the Petition of the Earl of

Glouceſter

Glouceſter, it appears by the Record of the proceedings againſt the two *Spencers*, Father and Son, in that 15 *E.* 2. which are there repeated at large, that there was nothing Capital in their Caſe, neither in the Charge nor in the Judgement, ſo as this ſignifies nothing to the matter in queſtion, which is all can be ſaid to it. And as little ſhall I ſay to his witty alluſion of *bringing me to a ſight of my ſelf, as* Alexander *did his Horſe to the Sun, that he might not kick*; only this I might ſay, if I were as foul-mouthed as he, that indeed ſuch a ſcoffing injurious Scribbler were fitter to be anſwered with a kick, than with fair reaſoning by way of Argument.

Next we come to the 1 *H.* 4. Sir *William Rickhill*'s Caſe, where I think, I ſhould do well only to tranſcribe what he hath written, to ſhew it needs no anſwer, but that I ſhould waſte too much Ink and Paper: I repreſented in my Letter to you, that *Rickill* being ſent for into Parliament, no formal charge being againſt him, to give an account only by what order he had taken the Duke of *Glouceſter*'s Confeſſion at *Calais*, which he did, the Biſhops preſent; but when they came to conſider what was to be done upon it, then only the Lords Temporal were asked their opinion, which I alledge to ſhew, that the Biſhops there were not adviſed with, becauſe it might be preparatory to a further proceeding by way of Tryal: And this our Aſſerter ſays, is to ſerve an Hypotheſis, and learnedly gives it us in *Greek*, and bids the Reader judge, and ſo do I. Then for the Tryal of *Hall*, who was one of the

the murtherers of the Duke of *Glouceſter*, he hath the condeſcenſion to acknowledge it probable that the Biſhops were not there, but then ſaith, that they left it to the Temporal Lords, without any Impeachment to their right, it being ſecured before by the ſecurity of a confeſſed Act of Parliament, 11 *R.* 2. it is their Proteſtation he harps at. And if I had as much *Greek* as he, I would ſay it in *Greek*, that he now doth *ſerve an Hypotheſis*, or in good *Engliſh*, beg the Queſtion, for that is his meaning of ſerving an Hypotheſis, for the Right which the Biſhops there ſaved, he will have to be, and hath forty times repeated it, to judge Capitally when they pleaſe; but I have clearly ſhewed it was not of their aſſiſting in thoſe Judgements, as he ſtill will have it to be, but other Judgements and proceedings in Parliament, where in truth they had a right to aſſiſt.

Then follows the Caſe of *William Sautré*, 2 *H.* 4. where he is pleaſed to give me a wipe for ſtiling him the Protomartyr of *England*; and out of his great reading informs, that St. *Alban* lived ſome hundreds of years before him; but he muſt give me leave to inform him, that the common acceptation of Martyrs amongſt us Proteſtants now, is of ſuch Orthodox perſons as have ſuffered for the truth, whom the Papiſts have put to death for Hereticks, and this man was the firſt of them in *England*. He hath ſome other notable Remarks; one is, that whereas I ſaid that the Biſhops and Clergy of thoſe times were the chief Promoters of bringing him to his

end, which I meant of their declaring him an Heretick, and then turning him over to the Secular Power, he obſerves upon it, *That then they acted in a Capital Caſe*, which he ſaith makes againſt me: And that if it was the Lords Temporal who ſigned the Warrant for his execution, that the Biſhops had no hand in it, and ſo have eſcaped my laſh, but who were his Judges, *nondum conſtat*, I am ſure it doth not *conſtare* to me to what purpoſe he ſaith all this, which I do not find to make either for him, or againſt me.

No more, than what he ſaith of the Caſe of the Earls of *Kent*, *Huntington*, and *Salisbury*, 2 *H.* 4. who he grants were declared and adjudged Traytors by the Temporal Lords, and no Biſhops preſent, and then ſaith, he will give a Parallel Caſe, it is of the Earl of *Cambridge*, and the Lord *Scroope*, 3 *H.* 5. where the Biſhops were preſent, and that I confeſs they might be ſo, becauſe it was in paſſing an Act of Parliament to confirm their Attainder. But my Gentleman is miſtaken, as he commonly is almoſt in all his Aſſertions, for the Caſes are not parallel, the Earls of *Kent*, *Huntington* and *Salisbury* had no Tryal, had not been legally condemned and attainted, but being taken in *Circeſter* by the Townſmen riſing upon them, were by them in a tumultuary manner put to death, and the Houſe of Peers afterwards in a judicial way adjudged the fact of thoſe Lords Treaſon, and them Traytors; and this was done only by the Temporal Lords, who are there particularly named. But the Earl of *Cambridge* and the

the Lord *Scroope* had been Tryed, Condemned and Executed at *Southampton*, and this Judgement afterwards was brought into Parliament, and there confirmed by Act of Parliam. where the Biſhops were, and might be preſent: but our Aſſerter hath ill luck in all his allegations.

And he will have as ill luck in what he ſaith to the Earl of *Northumberland*'s Caſe, 5 *H.* 4. where I am ſure he begs the Queſtion, and doth *Diſputare ex non conceſſo*, for whereever *Lords, or Peers of Parliament* are mentioned, he will have the Biſhops to be comprehended, whereas thoſe general words, as all other ſuch, are to be underſtood *Secundum ſubjectam materiam*: If it be in a Caſe where the Biſhops are particularly by the Law of the Land, and the continual practice in the execution of that Law excluded, and others are comprized under the ſame general expreſſion, it muſt be underſtood of them only, and not of thoſe upon whom there is ſuch a bar. Now they who will have the Biſhops to be Peers, do not make them the ſole and only Peers, but allow Earls and Barons to be Peers with them. But I do not allow them to be Peers at all, our Aſſerter will prove them to be Peers by two Records, *Mautravers* Caſe, 4 *E.* 3. and their Proteſtation, 11 *R.* 2. I have already given an account of what is in *Mautravers* Caſe, the words are, *All the Peers, the Earls and Barons being met*, &c. Is it not ridiculous to expound this, that by *All the Peers* is meant only the Biſhops, as if the dignity of the Peerage did principally belong to them, that they ſhould be Peers *Sans queue*, as the

French denominate a thing that belongs to ſome particular perſon more properly, and in a more eminent degree, than it doth to any body elſe? Or is it not more rational, and indeed only ſo, to underſtand this expreſſion to import that the Earls and Barons were the Peers who then met, and that ſaying, *All the Peers, the Earls and Barons*, &c. the Earls and Barons are an *Exegeſis*, an expoſition of the foregoing general denomination of Peers, ſo *Mautravers* Caſe makes nothing for him, but much againſt him: And as to their own Proteſtation, 11 *R.* 2. indeed they call themſelves *Peers* there, but that doth not make them ſo, I have ſpoken to this point already very fully, and ſorry I am that I am forced to do it again, and to do it ſo often, but he leads me to it, who doth as the Proverb ſaith, *Reciprocare ſerram*, go over and over the ſame thing, as much as ever any man did, I think, and as often miſtake. The force of my Argument to prove that by the general appellation of the Lords who proteſted againſt the Kings delivering the Earls Petition to the Judges, to have their opinion, and judged the fact themſelves not to be Treaſon, but a Treſpaſs, could not be meant Biſhops, becauſe the Record ſaith, **Sur quoy le dit Conte molt humblement remercia le Roy, e les dits Seigneurs ſes Piers de lour droiturel Jugement**: *Whereupon the ſaid Earl very humbly thanked the King, and the ſaid Lords his Peers, for their right Judgement.* Now the Biſhops could not be Peers to the Earl, who could not try him nor be tryed by him,

him, they being to be tryed only by Commoners, and Commoners to try them, if there be occaſion, of which more ſhall be ſaid afterwards in its proper place. I will here only obſerve one thing, that our Aſſerter hath it inſtead of *Humbly thanked*, *Humbly reverenceth the King*; which he takes out of the Pamphlet that goes under the name of Mr. *Seldens* Baronage, which I have ever looked upon as a ſpurious Book, not made by Mr. *Selden*, who would never have ſo tranſlated *Remercia*, and being full of faults and falſehoods, yet this Book, and Sir *Robert Cotton's* Abridgment, which hath likewiſe faults enough, are the chief Oracles that he conſults, and which do many times deceive him, as the ancient Oracles did thoſe who reſorted to them. Of as little ſignification is what he adds of the Lords of Parliament declaring the action of *Henry Percy*, who was killed at the Battel of *Shrewsbury* to be Treaſon; where he doth aſſure you the Biſhops were preſent, and you ſhall have his Oath for it, I dare ſay, if you will: And how doth he prove it? Why, ſaith he, *the Arch-biſhop of* Canterbury *was preſent at the former Judgement, for in expreſs words he prayed the King, that forasmuch as he and other Biſhops were ſuſpected to have been of confederacy with* Henry Percy, *that the Earl of* Northumberland *would now publiſh the truth, whereupon the Earl, by the Kings command upon his Oath, purged them all.* And then learnedly argues, That here was no departure of the Arch-biſhop and of the other Biſhops concerned: And I believe him, for

in truth here is a good proof that they were all preſent, but to be purged themſelves, that they ſhould not be thought Criminal, not to act as Judges, which is what our worthy Aſſerter doth aſſert, and what he would have us think that he fully proves, which he doth *more ſolito*, that is *Cujus contrarium*, &c. Then my Gentleman (for he is an active Gentleman) makes an Alman leap to the very end of the laſt leaf of Sir *Robert Cotton*'s Abridgement, where he finds a marginal note of Mr. *Prynn*'s to this purpoſe, *That the three Eſtates muſt concur to make a Parliament*, or Richard *the Third's title would ſtill be ambiguous*; and this he thruſts in here by head and ſhoulders, I underſtand not how to the preſent purpoſe, I think only to have the occaſion to ſay, that Mr. *Prynn* knew better of Records, and what *Plein Parlament* meaneth than I, and another whom he joyns with me, and twenty more ſuch as we are, which I deny not, though he ſhould add to the number, himſelf, and forty more who were no wiſer than he, who all of them would not make our ballance two grains the heavier.

Then he comes to the Caſe of the Earl of *Northumberland*, and the Lord *Bardolph*, 7 *H.*4. which, he ſaith, I ſay is like to that of the Earls of *Kent*, *Huntington* and *Saliſbury*, 2 *H.*4. and that is true, for in both thoſe Caſes, thoſe Lords after their deaths (having had their lives taken from them in a tumultuary way, without any formal Tryal) the buſineſs being brought into Parliament, were by the Temporal Lords, in a Judicial way of proceeding, adjudged

adjudged to be Traytors, and their fact to be Treaſon. But then he adds, that I likewiſe make the Caſe of the Earl of *Cambridge*, 3 *H.* 5. like to theſe, which is not true, being of a clean different nature, an Act of Parliament which had its riſe from a requeſt of the Houſe of Commons, who brought it up to the Lords; here, I ſay, the Biſhops were, and might be preſent.

That which he ſaith to the Caſe of Sir *John Oldcaſtle*, 5 *H.* 5. is ſo threadbare with rubbing it over and over again, and hath been ſo often ſaid, and ſo often anſwered, as that it would too much treſpaſs upon your patience, Sir, to trouble you with any one word of it more; I think I have made it exceeding clear, where under the general term of Lords of Parliament, Biſhops may be underſtood to be comprehended, and where not. Thoſe particular Caſes which he now brings to prove his Aſſertion, are point blank againſt him, that is the Caſe of *Mautravers*, 4 *E.* 3. and of *Gomenitz* and *Weſton*, 1 *R.* 2. in that of *Gomenitz* many particular Lords are named, ſeveral Earls and Barons, and then a general clauſe, *Et pluſieurs autres Seigneurs, Barons & Bannerettes.* Is it poſſible to think that Biſhops come in that fag end? Indeed I do obſerve one thing in this Caſe of *Sautre*, which is not in any of the other; I cannot ſay that I lay any great ſtreſs upon it, yet ſomething it is, that the Record expreſſes that the Biſhops had done with him, declaring him a Heretick, and then **Relinquentes eum ex nunc Judicio ſeculari:** *Leaving him from henceforward*

ward to the Secular Judgement, as if they ſhould ſay, They would have no more to do with him.

And as convincingly he argues in the Caſe of Sir *John Mortimer*, 2 *H.* 6. He confeſſes with me that the Indictment found againſt him at the *Guild-hall* was brought into Parliament, before the Duke of *Glouceſter*, and the Lords Temporal, **Fuit liberatum**, *It was there delivered to them*; and then he cites a Record (as he makes it) **De adviſamento dictorum Dominorum auctoritate iſtius Parliamenti ordinatum eſt & ſtatutum quod ipſe uſque ad Turrim ducatur**; *By the advice of the ſaid Lords, it was ordained and enacted by authority of the ſaid Parliament, and by the advice of the ſaid Lords Temporal, that he ſhould be led to the Tower*: Theſe are his words, and how he hath mangled, and falſely rendred and expounded the Record, you will judge by the words of the Record it ſelf, which I will here faithfully ſet down. It is this, *Numb.* 18. **Memorand. quod 26. die Februarii anno præſenti de adviſamento Dominorum Temporalium ac ad Supplicationem Communitatis Regni Angliæ in præſenti Parliamento exiſtentium redditum fuit quoddam Judicium verſus Johan. de Mortimer, de Withops-Hatfield in Comitatu Hertford Chevalier, cujus quidem Judicii record. patet in Schedula per Johannem Vals unum Juſticiariorum Domini Regis de banco edita & præſenti Rotulo conſuta**: *Memor. That the 26th of* February *of this preſent year, by the advice of the Lords Temporal, and at the Petition of the Commons in this preſent Parliament, a certain Judgement was given upon Sir* John Mortimer

timer *of* Biſhops-Hatfield, *in the County of* Hertford, *Knight*; *the Record of which Judgement appears in a Schedule drawn by* John Hals, *one of the Juſtices of the* Kings-bench, *and faſtened to this Roll.* Then follows the Schedule it ſelf, where is ſet down what paſt at *Guildhall* upon the finding of the Indictment, and how that Indictment was brought into the Parliament, **Coram duce Bedfordiæ ac aliis Dominis Temporalibus**; *Before the Duke of* Bedford, *and the other Lords Temporal*; and how Sir *John Mortimer* was brought before them by the Lieutenant of the *Tower*, and how the Commons deſired the Indictment might be affirmed, and that Judgement might be given upon him: Then follows, **Super hoc viſo & plenius intellecto Indictamento, per dictum Ducem de adviſamento dictorum Dominorum Temporalium ac ad requiſitionem totius Communitatis authoritate iſtius Parliamenti ordinatum eſt & ſtatutum quod Indictamentum affirmetur, & prædictus Johannes Mortimer de proditionibus prædictis ſit convictus, ad Turrim ducatur, uſque ad furcas de Tyburn trahatur, & ſuper eas ſuſpendatur**, &c. *Hereupon the Indictment being viewed and well underſtood, it was by the foreſaid Duke, by the advice of the ſaid Lords Temporal, and at the requeſt of all the Commons, ordained and decreed that the Indictment ſhould be affirmed, and the foreſaid* John Mortimer *ſtand convicted of his foreſaid Treaſons, ſhould be carried to the* Tower, *then drawn to the Gallows at* Tyburn, *and there hanged*, &c. This was a Judgement of the Houſe of Peers in

their

their Judicial capacity, upon an Impeachment, and at the purſuit of the Houſe of Commons, who proſecuted and preſſed the evidence before the Lords; the words of the Record are, **Tota Communitas prædictum Indictamentum illud in omnibus juxta vim formam & effectum ejuſdem pro vero & fideli Indictamento affirmat, ac prædictis Duci ac aliis Dominis Temporalibus ſupplicat eadem Communitas quatenus iidem Dux & Domini Indictamentum prædictum pro vero & fideli Indictamento affirmare vellent, & quod executio dicti Johannis Mortimer ut de proditionibus & feloniis convicti fiat**; *The whole Houſe of Commons do affirm the foreſaid Indictment to be in all points for the force, form and effect thereof, a true and legal Indictment, and that execution of the ſaid* John Mortimer, *as of one convicted of the ſaid Treaſons and Felonies may follow.* This you ſee was a formal Tryal in all points, and a Judgement upon it, and ſo it is entred upon the Roll, ſuch a day, 26 *Februarii de adviſamento Dominorum Temporalium ad Supplicationem Communitatis redditum fuit quoddam Judicium verſus Johannem de Mortimer*, &c. And our Aſſerter here tells us a tale of a Tub, that the matter ſhould be decreed after by Authority of Parliament, of which the Biſhops are an eſſential part, and therefore were preſent, which is an excellent Chimæra, as if the *Adviſamentum Dominorum Temporalium, & Authoritas Parliamenti*, were two diſtinct things, and the work of ſeveral perſons, ſome actors in the one who were not ſo in the other, and that the advice of the Lords

Lords Temporal had produced ſome other things which had a greater authority, and that the Biſhops had joyned in that, which ſhews his ignorance in the courſe of Parliaments, for the Judgement which is given Judicially in the Houſe of Lords hath upon it the ſtamp and the authority of the whole Parliament, and that *Adviſamentum* of the Lords Temporal here, was the Judgement, as is the advice and aſſent of the Lords Spiritual and Temporal, and of the Commons in Parliament in the paſſing of an Act of Parliament, for when a thing is ſaid to be enacted, by the King, with the advice and aſſent of the two Houſes, that advice and aſſent of the two Houſes is their paſſing and enacting of it, as to their part in it: For any thing that is done in either Houſe, if the King be mentioned in it, is ſaid ſtill to be done by him with the Advice and Conſent of that Houſe, ſo in a Judgement judicially given by the Houſe of Peers (where anciently the King was often preſent, when they acted judicially) it is ſaid to be given by the King, by the advice of his Lords, and here the Duke of *Glouceſter* repreſented the Kings Perſon, and held the Parliament by Special Commiſſion; ſo the Judgement is ſaid to be given by him, by the advice of the Lords Temporal. And ſo the Lords 28 *H.*6. when the King of himſelf gave the Judgement upon the Duke of *Suffolk*, the Lords proteſted againſt it, *becauſe it proceeded not by their advice and counſel:* For that is it which gives the form and being to the Judgement, and ſtamps upon it the Authority of the Parliament.

Then

Then he comes to a Precedent without debate, as he calls it, which is that of 28*H.* 6. the Duke of *Suffolk*'s caſe, and confeſſed ſo by me, as he ſaith, but not truly. For I do not allow it to be a juſt and legal precedent. I do acknowledge that the Biſhops were preſent all along the whole tranſaction of that buſineſs, but as I ſaid in my firſt Letter to you, ſo I muſt and do ſay in this, there was in it from the beginning to the end nothing regular, nor according to the uſage and practice of Parliaments: Then it cannot be ſaid to be a Precedent, no more than a Monſter, that hath no ſhape nor limb of a true Child, can be ſaid to be a Child. As for the particular deformities of this Monſter (for ſo I may term it) they are already ſo fully deciphered in my former Letter, as I will not now trouble you with them again: So it ſhall paſs at this time as he will have it, for a *Precedent without debate*, for it ſhall not be any further debated. Only I muſt ſay ſtill, it is but a ſingle Precedent, and of what force that is, or can be, when the conſtant courſe and practice of Parliaments hath been to the contrary, I leave it to you to judge: One ſingle Precedent againſt all other Parliaments, is an unequal match one would think. I have heard of a great conquering Prince, that gave it for his Motto, *Solus contra omnes*, but I have not heard it ſaid ſo of a Parliament, *Solum contra omnia.* The authority of any one Parliament I know to be very great, yet it is a known Maxime in the Law, **Parliament poit erreꝛ**, *A Parliament may*

err;

err ; and another Parliament may mend what one doth amiſs ; Parliament-men are men, and may, and do ſometimes miſtake as well as other men ; it is poſſible they did ſo, 28 *H.* 6. and more than probable they did ſo, becauſe no other Parliament before nor ſince, did ever do the like. And for his Recapitulation of all the fore-mentioned Records, in all twenty ſeven, which he makes to prove that this was not a ſingle Precedent, as I affirm it to be, all the reſt (as he ſaith) concurring with it, to admit Biſhops to be Judges in Capital Caſes, I will only ſay, *Sit liber Judex*, reſort to the Records themſelves, and to what is already ſaid in my former Letter and this, and then judge if he ſaith true.

Then he hath a fling at me for what I ſay upon the Caſe of *Nicholas de Segrave*, 33 *E.* 1. where he muſt give me leave to ſay with truth, what he ſaith falſly of me upon ſeveral occaſions, which is this, *That he hath not ſet down things Faithfully and Ingenuouſly.* He ſaith *Segrave* came into full Parliament into the preſence of the King, the Arch-biſhop of *Canterbury*, and ſeveral Biſhops, Earls and Barons, acknowledged his offence, and ſubmitted to the Kings pleaſure : Upon this he obſerves, *That here was no Judicatory of Parliament* ; and then adds, that the King pardoned him, **De conſilio Comitum, Baronum, Magnatum, & aliorum :** *By the advice of the Earls, Barons, Nobles, and others.* You ſhall ſee now how faithful and ingenuous a dealer our Aſſerter is, but certainly he takes all upon truſt, and takes not the pains to ſee any thing himſelf.

First,

First, I do acknowledge it was no formal Tryal. for there was no impeachment nor Indictment againſt him, but I muſt ſay it was *Tantamount*, for he comes in upon Summons into the Parliament then ſitting, where the Prelates were among the reſt of the Members of the Houſe, and how long they continued there, it appears not by the Record, but he being come, *Nicholas de Warwick*, the Kings Councel, charged him, and preſſed matters againſt him. *And then the King*, as the Record ſaith, *willing to have the advice of the Earls, Barons, Nobles, and others of his Counſel, enjoyned them upon the Homage, Fidelity and Allegiance which they owed him, to give him faithful Counſel, what puniſhment was fit to be inflicted upon ſuch a fact ſo confeſſed: Who all of them upon a ſerious debate, and adviſing upon the matter, and well weighing all the particulars of it, and what was by the ſaid* Nicholas *plainly and expreſsly acknowledged, do ſay, That ſuch a man deſerved to loſe his life.* But afterwards the Record ſaith, **Dominus Rex tamen de gratia ſua ſpeciali pietate motus, malens vitam quam mortem eorum, qui ſe voluntati ſuæ ſubmittunt, remittit eidem Nicholao Judicium vitæ & membrorum.** *But the King moved by his ſpecial grace and piety, deſiring rather the life than the death of thoſe that ſubmit to his will, did remit unto the ſaid* Nicholas *the Judgement of loſs of Life or Member.* Here you ſee the King adviſed not with his Prelates, but with the Earls, Barons, and other Nobles, and what did they adviſe? Not to pardon him, as our Aſſerter will have it, but they ſay he deſerved death,

death, and then the King of himſelf would not have it go to that extremity. Now whether this Judgement would have been final, if they had pronounced ſentence, and adjudged him to death, as they only ſaid *ſuch a man deſerved death*, or whether this was only to be preparatory to a Tryal, and to proceed afterwards upon a formal Impeachment; I confeſs it is not clear to me, nor is it greatly material to our purpoſe, only it ſhews the Biſhops were to give no advice in it one way or other; and it is rather ſtronger to prove they are not to meddle in ſuch matters, if it was but preparatory: For it ſhews that in thoſe Capital Caſes they muſt have nothing to do with them to determine and judge any thing concerning them, from one end to the other, *ab ovo uſque ad mala*, as the ſaying is, neither in the Judgement it ſelf, nor any thing leading to it.

So he comes to the Arch-biſhop *Becket*'s Caſe, where he notably ſpends his mouth, but like an ill Hound, all upon falſe Hunting, and indeed runs riot ſo far, as he is not to be laſhed in: He fills ſeveral leaves of his Book with *Encomium*'s of the Popiſh Clergy, becauſe ſome of them ſometimes did what it was their duty to do, which doth not excuſe them in the general current of their proceedings, commonly to ſtand for the authority of the Pope, and the See of *Rome*, againſt the Regal power, and the authority of Parliaments, as they did 20 *R.* 2. ſaying, *They were ſworn to the Pope, and to that See, and they would oppoſe whatever the King, and the Temporal Lords ſhould do.*

En

En reſtriction del Poair Apoſtolique ou derogation de la liberté de Saint Egliſe ; *In reſtraint of the Power Apoſtolick, or derogation of the Liberty of Holy Church.*

So he takes much pains *to aſſert the King's natural right to command his Subjects to ſerve him upon any emergency, and ſo to make Clergy-men Juſtitiaries, if he ſee cauſe for it:* Which then gives them power of Judicature, and I do acknowledge it, but it is to be underſtood of Judicature in ſuch Caſes as the Law of the Land allows; we know they have been ſome of them Lord Chancellours, Lord Treaſurers, Lord Privy Seal; but can he ſhew me, that any of them judged in Caſes of Blood? For this Caſe of *Becket*'s is certainly miſrepreſented in *Fitz-Stephens* manuſcript. We know there have been heretofore in many Counties, Juſtices of Aſſize, which have been Clergy-men, joyned with others in Commiſſion, who were not Clergy-men, to take Aſſizes in the County: And the Act of Parliament, 27 *E.* 1. *c.* 3. coming to give power to thoſe Juſtices of Aſſize to deliver the Gaols, and ſo to be made Juſtices of Gaol-delivery, and try Felons and Murtherers; it provides, that if one of them be a Clerk, then one of the moſt diſcreet Knights of the Shire ſhall be aſſociated to him, that is a Lay-man, and be empowered by the Knights Writ to deliver the Gaols of the Shires, and chaſten and puniſh whom they ſhall find to be guilty. And this Statute is confirmed, 2 *E.* 3. *c.* 2. which makes it manifeſt what the intendment of the Law is in that

that particular, that Clerks muſt not meddle to judge in Caſes of Blood, and muſt hold good even for Biſhops, who are all of them Clerks.

As for this Caſe of *Beckets*, which only ſtands upon the credit of a Manuſcript, ſaid to be made by *Fitz-Stephens*, a Monk, whom he characterizes for a ſober and grave Hiſtorian, and *more ſolito*, out of the ſweetneſs of his nature gives me a laſh, ſaying, *It is uſual with me to let fall expreſſions to vilifie Teſtimonies and Precedents when they make againſt me*; and this becauſe I ſtile it a *Blind Manuſcript*, and ſuſpect the Author as partial, having been a creature of *Beckets*, and conſequently no friend to the King. And therefore I give rather credit to the unanimous conſent of the Hiſtorians of thoſe times, who do not relate the paſſages of that Tryal to be as he makes them, than I do to him and his Manuſcript. I call it a *Blind Manuſcript*, becauſe it ſees not the light, lyes obſcure in ſome bodies Cloſet, Mr. *Selden* doth not tell where, and I dare ſay our Aſſerter never ſaw it, though he terms the Author a grave Hiſtorian. His tale is, how at that great Council at *Northampton*, **Archiepiſcopus læſæ Majeſtatis Coronæ Regiæ arguitur, quia eſt a Rege citatus pro cauſa Johannis, neque venerat, neque idonee ſe excuſaſſet**, &c. *The Arch-biſhop is queſtioned for Treaſon againſt the Crown of the King, becauſe he was ſummoned by the King in the Cauſe of* John (*that is one* John *the* Marſhal, *who complained that the Arch-biſhop had done him injuſtice in his Court*) *and he neither came, nor had ſufficiently excuſed himſelf upon*

ſickneſs, or any other juſt reaſon which might neceſſarily hinder him, whereupon he was condemned to forfeit his perſonal eſtate, and the Biſhops and Barons not agreeing who ſhould pronounce the ſentence, they putting it off from one to another, at laſt the King commanded the Biſhop of Winchelter *to do it.* This is his ſtory, and one may think it a ſtrange piece of Treaſon, one not to come immediately upon a Summons to attend the King, eſpecially if it be true what all the Hiſtorians that write of thoſe times have related of this buſineſs. *Gervaſius Dorobernenſis* is an Author, as Mr. *Selden* obſerves, who lived in that age, and one of whom Mr. *Selden*, and all Antiquaries (we are ſure) have a good opinion: and though our Aſſerter is confident enough to affirm they all have ſo of *Fitz-Stephen*, it is of what I do not find, that much hath been ſaid by them to ſhew that, nor do I think that any of our Antiquaries, but Mr. *Selden*, doth ſo much as mention him: And from *Gervaſius Dorobernenſis*, we have this relation, **Rex præcepit præſulis & Proceres regni apud Northamptoniam una cum ipſo Archiepiſcopo convenire**, &c. *The King commanded the Prelates and Nobles of the Kingdome, together with the Arch-biſhop himſelf, to meet at* Northampton, *where the Arch biſhop was accuſed of many things; firſt, that he had not fully done juſtice to one* John *that had a ſuit before him; then that upon this occaſion being called into the Kings preſence, he neglected to come. To this the Arch-biſhop made anſwer, That* John *had all the juſtice done him that was due to him, that*

that he had illegally defamed his Court, that he would not ſwear upon the Evangeliſts, as the cuſtome is, but upon an old Song-book which he brought with him. But that being upon this ſummoned, he came not into the Kings preſence, was not upon any contempt, but that he was hindred by a great ſickneſs, and that he had excuſed himſelf by two competent witneſſes whom he had ſent for that purpoſe; yet this ſerved not his turn, but **Curiali Judicio & Epiſcoporum conſenſu condemnatus eſt**; *He was condemned by the Judgement of the Court, the Biſhops conſenting to it, that all his perſonal eſtate ſhould be at the Kings diſpoſing.* This now is delivered unto us by an unqueſtionable known Author, who lived in that time. *Fitz-Stephen* and he agree in the matter of the Accuſation, and agree in the Judgement, but *Fitz-Stephen* lays it to be *Crimen laſa Majeſtatis Coronæ Regiæ*, High-Treaſon, which muſt be for not coming to the King when he was ſummoned: *Gervaſius* ſaith, that he ſent his excuſe by two witneſſes, who teſtified that he was then very ſick, and not able to come, which we all know to be a Lawful Eſſoine, *De malo lecti*, which cannot be diſallowed, but muſt excuſe, nay, juſtifie any bodies abſence. Now can any body that is maſter of common ſenſe, believe *Fitz-Stephens* relation, who will have this to be a Capital crime, High Treaſon, and a Capital proceeding upon it? We ſee the Sentence was far from Capital, and could not have been ſuch as it was, if the Crime had been laid in the Accuſation to be High Treaſon. *Roger de Hoveden* in his relation of this

buſineſs, makes no mention of Treaſon, *He ſaith, That the King calling a great Council at* Northampton, **Tædium magnum fecit Archiepiſcopo**, *did a thing which much vexed the Arch-biſhop, which was, that he cauſed his Horſes to be put into the Arch biſhops Inn, whereupon the Arch-biſhop ſent the King word, that he would not come to the Council till his Inn was cleared of thoſe Horſes; yet upon the ſecond day of the meeting, the Arch biſhop came into the Chapel where the Council ſate, and there deſired the Kings leave, that he might go over into* France *to viſit Pope* Alexander *who was then there, which the King denied him, and ſaid he ſhould firſt anſwer for the injuſtice he had done to* John *the Marſhal, in his Court: This* John *having complained to the King, that he had had a long ſuit in the Arch biſhops Court for ſome Land he held of him, and could have no Juſtice, and that thereupon* **Curiam Archiepiſcopi Sacramento falſificaverat ſecundum conſuetudinem Regni:** *He had, according to the cuſtome of the Kingdom, upon Oath charged the Court with wrong doing (* which I take to be a proteſting againſt the proceeding of that Court, and the Judgement there given, in the nature of a Writ of Error.) *The Arch-biſhop anſwered to this, That* John *had no injuſtice done him, and that he brought into the Court a certain ſtrange Book, and would ſwear upon that; how for want of Juſtice, he left my Court, which the Officers that kept my Court, looked upon as an injury done to me, becauſe it is the Law of the Kingdome,* **Quod qui Curiam alterius falſificare voluerit, oportet eum jurare ſuper ſacroſancta Evange-**

lia;

lia: *Whoever will ſo charge a Court with falſe dealing, muſt take his Oath upon the Holy Evangeliſts. Notwithſtanding this, the King ſwore he would have Juſtice done upon him.* Et Barones Curiæ; *And the Barons of the Court gave Judgement on him to be at the Kings mercy: Which Judgement the Arch-biſhop going about to reverſe,* (Judicium illud falſificare, is the expreſſion) *He was perſwaded by the Barons to ſubmit himſelf to the Kings mercy for a Fine of five hundred pounds.* Here is nothing in all this that can poſſibly infer any thing like Treaſon.

And it is ſomething obſervable, what both theſe Authors ſay of the Judgement given; *Gervaſius* ſaith, *Curiali Judicio & Epiſcoporum conſenſu condemnatus eſt*; as if the part of the Biſhops in this judgement were ſomething differing from the Act of the Court, and not comprized in it: *Hoveden* ſaith, *Barones Curiæ Regis judicaverunt eum*; as if the Biſhops had no hand in it at all. *Radulphus de Diceto Decanus Londinenſis*, I ſuppoſe Dean of *Pauls*, who lived in thoſe times, mentions this buſineſs, he ſaith, *That the Arch-biſhop was queſtioned upon* John *the Marſhals complaint, and fined* 500*l. and that he was queſtioned likewiſe for moneys received by him, when he was Chancellour, for ſome Biſhopricks and Abbies, of which he had received the profits, during their vacancies, and that* not finding the Biſhops to be his friends, he appealed from their Judgement, but then the Proceres, *the Nobles*, though he appealed from their Judgement likewiſe, yet they In eum nec confeſſum nec convictum, ſententiam intorſerunt: *They wreſted*

a Judgement againſt him, though he confeſſed nothing, nor was at all convicted. You ſee here is not a word of Treaſon laid to his charge, nor nothing Capital, or any thing towards it. *Matthew Paris* tells you the ſame ſtory, and almoſt in the very ſame words. Now let any man judge, whether all thoſe Hiſtorians concurring, or ſingle *Fitz-Stephen* diſagreeing, deſerves more credit: And that which hath greateſt weight with me, is the Argument drawn *ex natura rei*, the crime which all agree that the Arch-biſhop was charged with, was his not appearing upon the Kings Summons, which without a great and a very falſe Multiplying-Glaſs, cannot appear to be any thing like Treaſon: So I muſt conclude, that ſince the Charge againſt him had nothing of Capital in it, the proceedings upon it was not as againſt a Capital Offender, not brought to Tryal as a Priſoner, but came in upon a bare Summons, and tarried there, and returned at full liberty, the Judgement neither of loſs of Life nor Limb, but meerly Pecuniary, and, as ſome of the Authors ſay, compounded with for five hundred pounds: I muſt I ſay, conclude, that this whole Caſe is nothing to our purpoſe, and neither the Law nor uſage of Parliament did bar the Biſhops from being perſonally preſent at ſuch a Tryal.

And now I come to the point of Peerage, which I have ſo fully handled in my former Letter, as I think I need not ſay much in this. Our Aſſerter brings three Arguments to prove them to be Peers: The firſt is, That it is the

the general ſtile of all Parliaments from the beginning, to be *Generale Concilium Cleri & Populi*, even before the coming in of the *Normans*; which no man denies. The buſineſſes of the Church, as well as of the Civil State are there determined; the Writ of Summons ſhews it, which ſaith, That the King intending to call a Parliament, *Pro quibuſdam arduis negotiis Nos Statum & defenſionem Regni Anglia & Eccleſia Anglicana concernentibus.* Biſhops and Temporal Lords are ſummoned, and heretofore ſeveral others were ſummoned as Bannerets, and ſometimes other perſons of Quality who likewiſe were not Peers, and yet were called to the Parliaments as pleaſed the King; and the Judges are ſo ſummoned at this day, *Super dictis negotiis tractaturi conſilium ſuum impenſuri.* Where the Biſhops act as Biſhops, and what by the Law of the Land, and the practice and uſage of Parliaments they ought to do, that they do, and may do; the Temporal Lords in like manner, and ſo likewiſe the Judges every one acts in his Sphere; but this neither gives the Biſhops power to judge in Capital Cauſes, if otherwiſe it be prohibited them, nor doth it make them Peers, no more than it did formerly the Bannerets, and others, for their being ſummoned to ſit and vote in the Houſe of Peers: We had the experience of this the laſt Parliament, a Baron pretending to a much ancienter ſtation among the Peers, by proving that his Anceſtor had been ſummoned by one of our former Kings, to ſit more than once in the Houſe of Lords, yet not making

it appear that that favour had been ſtill continued to him; and it being made appear on the other ſide, that ſeveral Families in this Kingdom would have the ſame pretence upon the like ground, it was the opinion of the Houſe, that he had no Right to it; and conſequently that his Anceſtor was never acknowledged to be a Peer of the Realm, and his Blood enobled, which otherwiſe would have deſcended from him to his Poſterity, and to this preſent Baron, who is ſince enobled by a later Creation, but takes nothing from that Anceſtor. So then it is clear, that ſitting in the Houſe of Peers, and having a parity of Vote, and enjoying many of the ſame priviledges with the Peers, doth not in true and proper ſpeaking, make the Biſhops Peers; no more than 21 *R.* 2. Sir *Thomas Percy* ſitting with the Peers, and Voting with them, as Procurator for the Biſhops, was thereby a Peer.

His next Argument is, That in ſeveral Rolls of Parliament they are expreſsly called Peers, which cannot be denied, nor doth that make them Peers, if the eſſential parts of Peerage, be wanting to them: We know that denominations are many times taken up in a large and improper ſenſe, for ſome circumſtances, ſome ſimilitudes, ſomething which is extraneous unto them, yet wherein they agree with things of another nature: And ſo Biſhops having place and vote in the Houſe of Peers, and joyning with the Peers of the Realm, ſitting in Parliament, in all things, with equal power *uno excepto*, ſaving only

only in caſes of Blood, it is no wonder if they are often ſtiled Peers of Parliament. But the Precedents he cites, are falſly recited both in the Caſe of *Mautravers*, and that of *Gomenitz* and *Weſton*, as I have ſhewed before.

His third Argument is, That they have judged as Peers, upon Peers of Parliament. But I deny that they judge there as Peers, but as called to the Parliament, to be Members of the Houſe of Lords, as Bannerets were formerly, and many principal Gentlemen who were ſtill Commoners, and ſome Officers, as the Warden of the Cinque-Ports, who was no Peer ſometimes, and yet ſummoned up to the Houſe of Lords, and all theſe judged ſuch Peers as were tryed in thoſe Parliaments in which they ſate.

However, that Biſhops are not Peers of the Realm, and ſo conſequently not properly and truly Peers of Parliament, though often called ſo, I think will be clearly made out.

Firſt, I muſt, as I have formerly done, inſiſt upon the Great Charter, which Sir *Edward Cooke* ſaith, is declaratory of the Principal grounds of the Fundamental Laws of *England*, and which the Statute made 25 *E.* 3. *Confirmatio Chartarum*, will have to be obſerved as the Common Law, and all Judgements given againſt it, to be undone and holden for nought, this Law is certainly to be obeyed, and what is done in obſervance of this Law, is moſt legal: And it enjoyning every man to be tryed by his Peers, and Biſhops being tryed

ed by a Jury of Commoners, Commoners are their Peers, and they are Peers to Commoners, and not Peers of the Realm: Peers *per eminentiam*, as I may call them, or elſe *Magna Charta* is broken, and made a Law of no authority.

2. To be a Peer of the Realm, their Blood muſt be enobled, and their Perſons dignified; nor can they otherwiſe be put into the ſame rank with thoſe who are ſo, which would make but an ill accouplement, and they would never draw well together. Now Biſhops do not ſit in Parliament *ratione Nobilitatis*, but *ratione Officii*, as *Stamford* ſaith in his Pleas of the Crown, *p.* 153. **En reſpect de lour poſſeſſion ſe launcient Baronies annexes a lour dignitees:** *In reſpect of their poſſeſſions*, viz. *the ancient Baronies annexed to their dignities.*

3. If they were Peers, and their Perſons enobled, their Wives would be noble, and have the priviledges of Peereſſes, being Married or Widows, for Husband and Wife are one perſon in Law; but we know they have no ſuch priviledge, which ſhews their Husbands to be no Peers.

4. If Biſhops were Peers of the Realm, and any of them queſtioned for a Capital Crime in Parliament time, they could be tryed and judged only by the Houſe of Peers, and by no other Court of Judicature. The Lords could not avoid the trying of them themſelves, indeed any but Peers they may refuſe, except it be upon an Impeachment by the Houſe of Commons, for then they muſt retain it, and proceed in it, but not otherwiſe,

except

except they ſee ſome great cauſe for it, *Pro bono Publico*, as it is 1 *R.* 2. when the Commons deſired that no ſuit between Party and Party ſhould be undertaken, and determined by the Lords, or the Officers of the Council, but that the Common Law might have its courſe, except it be in ſuch a buſineſs, and againſt ſo great a perſon as one cannot elſe hope to have right done in it: The ſame is confirmed 1 *H.* 4. which I alledge to juſtifie the Judicature of the Houſe of Lords, upon thoſe who are not their Peers, upon ſpecial occaſion: But for trying of their Peers is a duty incumbent upon them, which they muſt perform; and any Peer who is queſtioned, may challenge it as his right, and it cannot be denied him. And therefore 4 *E.* 3. when they had, upon the Kings earneſt preſſing them, Tryed and Condemned Sir *Simon de Bereford*, Sir *John Mauravers*, and other Commoners, they make a Proteſtation, that they nor their Succeſſors, **Ne ſeroient mes tenuz ne chargez a rendre Jugements ſur autres, que ſur lur Piers**: *Should not be bound nor charged to give Judgement upon any but their Peers.* But we know that they have ſometimes turned off Biſhops to Inferiour Courts, as appears by the Record of it in the Exchequer, the ſame 4 *E.* 3. *Stephen Graveſend*, Biſhop of *London*, was complained of in Parliament, by one *John de Wymburne*, for ſaying, That if *Edward* the Second was yet living, as he was informed he was in *Corf*-Caſtle, he would aſſiſt him with all his power, to reeſtabliſh him in his Throne. Sir *Edward Cooke*

Cooke ſaith, that by order of Parliament the matter was referred to be tryed in the *Kings-bench*, but the Record ſaith, that the Parliament referred it to the Kings Council, and appointed him to appear before them at *Woodſtock* upon *Sunday* fortnight after *Eaſter*, and that they turned him over to the *Kings-bench* to be Tryed by the Chief Juſtice *Scroope*, and his fellow Judges. Whereas had this Biſhop been then accounted a Peer of the Realm, he muſt have been Tryed in Parliament; the Parliament being once poſſeſſed of his Cauſe, and they could not have referred him to any other Judicature.

So here you have four Eſſential parts of Peerage all of them wanting in Biſhops, and the want but of one Eſſential part is enough to deſtroy the whole. He can be no Peer of the Realm who is at the Kings ſute Capitally Tryed by a Jury of Commoners, if *Magna Charta* be good Law, which is our All as we are Free-men. Secondly, He who is not himſelf enobled, cannot be a Peer in equal rank to one that is: For all Peers are equally Peers, as we may ſay, Peerage doth not *recipere magis & minus*. The meaneſt Baron is as much a Peer as the greateſt Duke, elſe they were not Peers, it would be *Contradictio in adjecto*, an Imparity in a Parity. Thirdly, If the Husband be enobled, the Wife muſt be ſo; but the Wife of a Biſhop is not enobled, therefore the Perſon of her Husband is not, for the Wife and the Husband are one. Fourthly, If a Biſhop were a Peer, he could in Parliament time be Tryed no where

but

but in the Houſe of Peers, but Matter of Fact we find to be otherwiſe. Therefore, I think, I may ſafely conclude that Biſhops are no Peers.

But before I leave this point, I muſt anſwer one thing which is ſaid, They ſay, they hold by Baronage, and therefore they are Barons, as *Fitz. Stephen* makes the Biſhops in their altercation with the Temporal Lords about the pronunciation of the Sentence againſt the Archbiſhop, ſaying, **Non ſedemus hic Epiſcopi, ſed Barones: Nos Barones, & vos Barones, Pares hic ſumus:** *We ſit not here in Parliament as Biſhops, but as Barons; we are Barons, and you are Barons: Here we are Peers.* *Fitz-Stephen*'s authority ſignifies nothing to me; but this I know is ſaid, and believed by many, therefore it muſt be anſwered, to diſabuſe many, who may think, that holding by Barony creates a Baron, which it doth no more, than holding by Knights ſervice, makes a man a Knight, or holding by Villanage makes a man a Villain, which many do to this day, even but here at *Eaſt-Barnet*, and yet are good Free-men and no Villains, for it works not upon the Perſon, as *Fleta* ſaith, *l.* 3. *c.* 13. the ſervice they do, is *ratione tenementi non perſonæ.* So the Biſhops holding *per Baronagium*, are thereby made ſubject to do the ſervice of Barons, and to obey the Kings Writ of Summons to attend the Parliament, which makes them Lords of Parliament; but affects not their perſon. The Biſhop of the *Iſle of Man* is a Biſhop as well as any of the reſt, firſt inſtituted by Pope *Gregory* the Fourth, as Sir *Edward Cooke* ſaith; but not holding

by

by Baronage, hath no place nor vote in Parliament. We must know that this Tenure by Baronage was first created by *William* the First, of all the Lands which held of the Crown *in Capite*, consisting of so many Knights Fees, these Lands were divided, some to Lay-men, some to Ecclesiastical persons: And these were all bound to certain services, though not all to the same, and among others, all to attend in Parliament, whenever the King pleased to Summon them, and so became Lords of Parliament. This continued so till King *John*'s time, when the number of the Temporal Lords growing so great and numerous, that King made some alteration, which certainly was setled and confirmed by Parliament, but justly the time when this was done is not known, the Record of it being lost. The alteration was, that none of the Temporal Lords should come to Parliament but such as received the Kings Writ, a particular Summons for it. These were called *Barones Majores*; those who were not so summoned, and so did not come to Parliament were stiled *Barones Minores*, and were still Feodal Barons as before, and held their Lands *per Baronagium*, but were not Lords of Parliament. Therefore it was not barely holding by Barony, which made the person a Baron even in those times, there was an act of the Kings requisite even in the Summoning of him to Parliament, to make that Honour to affect and enoble the Person, and so to fix it, and make it hereditary in the Family; which way of dignifying a Person continued till the eleventh year of *Richard* the Second,

Second, when *John de Beauchamp*, Steward of the Houſhold, was firſt created by Patent, Baron of *Kiderminſter*, ſince which time it hath ſtill been practiſed to make them all Barons by Patent. But the Biſhops have ſtill continued upon the firſt Inſtitution of being by their Tenures obliged, and accordingly Summoned to attend in Parliament, which made them Lords of Parliament, but not Peers of the Realm.

And now I come to his laſt point making them a Third Eſtate, for which he cites the Bill preſented to *Richard* the Third in his firſt Parliament where they are made ſo, and to this I can oppoſe other paſſages in Parliament clean contrary, as that 2 *H.* 4. where the Temporal Lords and they together, are made to be one of the three Eſtates, and other inſtances may be given of the ſame nature: But let us a little conſider how that Bill was framed, 1 *R.* 3. it was firſt deviſed by certain Lords Spiritual and Temporal, and other Nobles, and notable Perſonages of the Commons, a Party picked out and choſen for that purpoſe, who preſented it in the behalf, and in the name of the Three Eſtates of this Realm of *England*; and what was this to do, to declare *Edward* the Fourth to have lived in adultery with Dame *Elizabeth Gray*, whom he had married, being precontracted to Dame *Ellianor Bottiler*, daughter to the Earl of *Shrewsbury*, and conſequently all his Children, Baſtards, *Edward* the Fifth a Baſtard, and *Elizabeth* his Siſter, a Baſtard, afterwards married to *Henry* the Seventh, which entituled him

him and his Poſterity to the Crown, ſet an end to all the foregoing competitions, and ſetled it as it is at this day, this Bill, as the Record ſaith, was firſt preſented and delivered to their Soveraign Lord the King, that was to *R.* 3. whom they made ſo in the name and on the behalf of the ſaid Three Eſtates, out of Parliament, and now by the ſaid Three Eſtates aſſembled in Parliament, ratified and confirmed. And truly, I muſt ſay, this is not an authority to be bragged of, for making the Biſhops a Third Eſtate.

But then let us ſee if the Biſhops ſitting in the Houſe of Lords, have the neceſſary and eſſential qualifications of being a Third Eſtate in Parliament, without which they cannot be a Third Eſtate there: That the Clergy is one of the three Eſtates of the Realm, and they the Principal and Chief of them, no body denies: And that they are Summoned to Parliament as a Third Eſtate of the Realm, the dignified Clergy perſonally, others of the Inferiour ſort by their Procurators and Repreſentatives, is likewiſe confeſſed; but not to have any part in making of Laws for the good Government of the Kingdom, no not ſo much as in matters meerly concerning the Church; but they may offer and propoſe and be conſulted with, but whatever they agree upon muſt come to the two Houſes of Parliament, and receive the ſtamp of their Authority, before it can be preſented to the King to become a Law, and be binding to the People: This is the work of the Convocation which meets at the ſame time with the Parliament, and there

is

is convened the Third Eſtate of the Realm; Where the Biſhops make the Upper Houſe. and there ſit as Biſhops according to their Spirituality. But their Summons gives them another capacity, which is to meet in the Houſe of Lords, and there *Cum cæteris Prælatis, Magnatibus & Proceribus regni de arduis negotiis Statum regni & Eccleſiæ ſpecialiter tangentibus tractare & conſilium impendere*; and thither they are obliged to come and attend by their Tenure of their Baronies, where they ſit in their Perſonal Capacity, to do the ſervice which they owe for the Lands they hold of the King.

Now we will conſider, if being there upon ſuch an account, it can any ways ſtand with reaſon, and the nature of a Third Eſtate, to eſteem them to be ſo. 1. To repreſent the body of the leſſer Clergy, as our Aſſerter will have them to do, who elſe, he ſaith, would be in a worſe condition than the meaneſt Clown, having no body to repreſent them in giving Aids and Subſidies; firſt, I ſay, that as Subſidies were heretofore given in Parliament, which was the ancient Parliamentary way of ſupplying the neceſſities of the Crown and Government, where the Convocation gave the Supply of the Clergy, the Biſhops as Members of the Houſe of Lords, had nothing to do in it, but as Members of the Convocation they had, and the Repreſentatives of the leſſer Clergy, who were choſen by them, and made up the Lower Houſe of the Convocation; they gave their conſents, and joyned in that Gift for the whole body of the Clergy; the two Houſes of Parliament did

only ratifie and confirm what the Convocation had done, and therefore only the beginning and the end of that Act of Subsidy given by the Clergy, not the body of it, was openly read in the several Houses of the Lords and Commons. So 4 *R.* 2. the Commons having offered to give an aid, so as the Clergy, who enjoyed a third part of the Realm, would pay one third part of the Summ; the Clergy answered, *That they were not to grant any Aid by Parliament, but of their own free wills, and therefore willed the Commons to do their duties, and they would do theirs.* This was the ancient way of granting supplies in Parliament, where you see the lesser Clergy had their Representatives, which it seems our Asserter did not understand, and so no wonder if he did mistake, as he commonly doth. And this I must say further, the lesser Clergy, as he calls them, are little beholding to him, to have them to be represented by Bishops, having no hand in the choice of them: This I am sure, puts them into a meaner condition than the meanest Clown, who if he have but 40 *s.* Freehold, gives his voice to whom he will to represent him in Parliament, to give his assent to part with his Money, and to make any Law to bind him. Of later times they have taken up another way of granting publick supplies, which is of so much in the Pound, which they call a Pound-rate, and this brings in the Clergy to pay their proportion, who are now as busie as any in electing of Members to Parliament. In a word, none can represent another in Parliament, that is not chosen by him; every particular

particular perſon that hath right of vote, being included in the majority of Vote: So the whole Clergy, being the third Eſtate of the Realm, and the Biſhops not being choſen by them, they cannot repreſent that third Eſtate.

2. The Biſhops ſit not in the Houſe of Lords *Ratione Spiritualitatis*, as was the opinion of all the Judges of *England*, 7 *H.* 8. in *Keilway*'s Reports, in Dr. *Standiſh*'s Caſe. **Les Spiritual Seignieurs nont aſcun place en le Parliament chamber per reaſon de lour Spiritualtie mes ſolement per reaſon de lour temporal poſſeſſions**: *The Lords Spiritual have no place in the Parliament chamber by reaſon of their Spiritualty, but by reaſon of their Temporal poſſeſſions.* How then can they be ſaid to be there a Third Eſtate, to repreſent the Clergy of *England*, when they ſit not there as Clergy-men?

3. If they be a Third Eſtate, they muſt have a Negative voice to whatever is propoſed in the Houſe, if the majority of their opinions be againſt it. And for our Aſſerter to ſay, that the Cuſtome, and ſo the Law of the Parliament is otherwiſe, and that the two Eſtates of the Lords Temporal and Spiritual make but one Houſe, where they vote intermixedly. Why, this ſhews they are not two Eſtates, becauſe they do vote intermixedly, for if they were ſo, they muſt vote ſeverally, and not be twiſted ſo together as they are, as I ſaid before in my former Letter, like a neſt of Boxes one within another. And think what a diſparagement it would be to the Houſe of Lords, that two Eſtates muſt be clapped together, to make them equal

to the one Eſtate of the Houſe of Commons.

4. If the Biſhops were a Third Eſtate, the Parliament could not act as a Parliament without them, for a Parliament is compoſed, and muſt conſiſt of Three Eſtates, and nothing is binding but what is ſo paſſed. But we know that in *Edward* the Firſt's time, there was a Parliament called and held *Clero excluſo*, and Laws were there made, when none of them were preſent, and many Acts have paſſed in ſeveral Parliaments, when the Biſhops have all voted againſt them. The Judges in that of 7 *H.* 8. deliver their opinions for Law: **Que noſtre Sur le Roy poit aſſetz bien tener ſon Parlement per luy, & ſes Temporal Seigniors & per ſes Commons, tout ſans les Spirituals Seigniors:** *Our Lord the King can hold his Parliament himſelf with his Temporal Lords, and his Commons, wholly without the Lords Spiritual.*

Theſe, and many other Reaſons, confirm me in my opinion, that Biſhops are neither Peers of the Realm, nor a Third Eſtate in Parliament, yet they might be both, and not invalidate my Poſition, which I at firſt undertook to prove, which was only this, that by the Practice and Cuſtome of Parliament, and by the Law of the Land, Biſhops are prohibited from meddling in Parliament as Members of the Houſe of Lords in any Tryal of a Criminal Perſon, where the Charge, the Proceedings, and the Sentence upon it is Capital, and goes to the Loſs of Life or Members, only one Precedent excepted, that extravagant one of

of 28 *H.* 6. And my good friend the Aſſerter who hath almoſt as many *Errata*'s as Lines in his Book, muſt give me leave to ſumm up all my Corrections of them in one Diſtich, as *Martiall* did thoſe of his Friend *Fidentinus*; ſuch another *Fidentinus*, it ſeems, as our Aſſerter; and it was this,

Emendare tuos O Fidentine libellos
Multæ non poſſunt, una litura poteſt.

And I muſt ſay the Verſe doth not better *quadrare* with the product of his Brains, which hath ſo many faults as can only be covered and put out of ſight with one raſure from the beginning to the end, than this one and the ſame Name of *Fidentinus* deciphers the Confidence of them both, *Nullâ palleſcere culpâ.* And ſo I ſhall leave my Friend *Fidentinus* to learn better manners, if he be not altogether incorrigible; and apply my ſelf to peruſe and anſwer (if I can) a Treatiſe of a worthy Gentleman, who is, I ſee, of a differing opinion from me, and hath much more of reaſon, and ſomething, though not much more of civility and fairneſs in the maintaining of it, ſo as whether or no his reaſons will convince me, I know not; but if they do, I will certainly grant it, for my Maxime is ſtill, *Amicus Plato, amicus Socrates, ſed magis amica Veritas.*

The Writer of this Treatiſe, intituled, *The Grand Queſtion concerning the Biſhops right to vote in Parliament in Caſes Capital, Stated and Argued*; doth ſtate the Queſtion right, that is, *Whether the Biſhops may be preſent and*

vote Judicially in Capital Caſes which come to be judged in Parliament, either in giving the Judgement it ſelf, or in reſolving and determining any circumſtance preparatory, and leading to that Judgement. Then he ſets down ſome things granted on both ſides, as 1. *That Biſhops do ſit in Parliament by vertue of their Baronies, and are bound to ſerve the King there.* From this he infers they have a Right of Judicature, which is not denied; but the queſtion is, as he ſaith himſelf, what this Judicature is. 2 *That they ſit by the ſame kind of Writ, that other Barons do.* Upon which he would infer, that they are impowered and required to conſer and treat of all the weighty affairs that ſhall be brought before them, the King having not limited nor reſtrained the one more than the other. But it follows not, becauſe all are called together by the ſame authority, that therefore the ſame duty is incumbent upon all, if there be a higher power that directs what every ones duty is to do, when they are come together. Now the King acts in a higher Sphere by the Law of the Land, and the law and practice of Parliament which prohibits Biſhops from meddling with judging of Capital Cauſes in Parliament, nor did they ever do it, but in one extravagant proceeding in 28 *H.* 6. where nothing was regular nor Parliamentary from the beginning to the end, which I look upon as altogether inſignificant to alter what is ſo ſetled by Law and conſtant Cuſtome, therefore the Kings Writ of Summons cannot diſpence with that, to make that lawful, which in it ſelf is unlawful; as I have ſufficiently proved

proved it. And I will now go a little further in it, than I did before, for hitherto I have only inſiſted upon the Law of Parliaments, as a thing ſetled in Parliament by the Conſtitutions of *Clarendon* in *Henry* the Second's time, and the Proteſtation of the Biſhops enrolled in Parliament by the King, Lords and Commons, 11 *R.* 2. but now I will deliver my opinion (which I ſubmit to better Judgements) that they lye ſtill under a Reſtraint by the Canon Law, which by the Statute 25 *H.* 8. *c.* 12. which (was repealed 1 and 2 *Phil.* and *Mar.* but revived 1 *Eliz.*) is ſtill of force, where it is not repugnant to the Laws of the Realm, which we are ſure this branch of it, reſtraining Biſhops from judging Capitally is not; ſo far from it, that it is confirmed and ſtrengthened by the Law of the Land. 3. The third Particular in which he ſaith all agree, is, *That they have their Votes in Bills of Attainder, acting in their Legiſlative capacity, which is as much a Caſe of Blood as the other, and perhaps as much forbidden by the Canon.* But I deſire this worthy Perſon to conſider, that the Practice of Parliament is the Law of Parliament, and is the commanding Law for regulating the Proceedings of Parliament, and that hath overruled this Point, that in the making of a Law, every Free-man of the Kingdom doth give his conſent, either explicitly if he be a Member of either Houſe, or implicitly by his Repreſentative, for every Free-man of the Kingdome is there preſent, or repreſented. And it is the Fundamental Conſtitution of our *Engliſh* Freedome, that no man can be bound by any

Law, but what himſelf hath conſented to; now a Bill of Attainder is as much a Law as any Statute Law of the Kingdom. Therefore Biſhops have acted in a Legiſlative capacity to judge and condemn Capitally, as ſeveral Precedents we have of it in *Henry* the Eight's time, but not in a judicial capacity. And to ſay the Canon Law prohibits one as much as the other, the Statute of 25 *H.* 8. clears that point, which takes away the force of the Canon in the one, not to abridge Members of Parliament from voting in the Legiſlative way, and ſtrengthens it in the other, forbidding Biſhops to vote Judicially in Caſes of Blood. Yet if you will have me deliver you freely my opinion in it, I think it is an abuſe crept in ſince *Henry* the Eight's time, for before none were judged by Bill, but ſuch as had been ſlain in open War, or Tryed, Condemned and Executed by Commiſſion, and then the proceedings brought into Parliament, and there approved of, and the Attainder confirmed, but under *Henry* the Eighth ſeveral perſons were condemned by Bill, and the Earl of *Strafford* lately in our memories, which ſeems now to be authorized by the Practice of Parliament. Sir *Edw. Cooke* tells a ſtory which he had from Sir *Thomas Gaudy*, one of the Judges of the *Kings-bench*, how the King had commanded *Cromwel*, and the Earl of *Eſſex*, to attend the Juſtices, and know of them, if a man who was forth coming ſhould be condemned by Act of Parliament, without being heard; who after ſome fencing, anſwered if it were ſo, it could not be afterwards called into queſtion; and

Cromwel

Cromwel himſelf was not long after ſo ſerved; but this is by the way. *Multa quæ fieri non debent, facta valent.* I have been a little the longer in theſe particulars, becauſe it will much ſmooth our way in the following diſcourſe.

And this worthy Gentleman muſt give me leave to ſay, That he needed not have put himſelf to all that trouble of his firſt Chapter, in telling us of the mighty power the Clergy had in the Primitive times in the ordering of Secular affairs, which certainly was more by way of Counſel, than any thing of Authority by way of Judgement, and in a Judicial way. And he will avow to me, I doubt not, that the miniſtery of the word was a full employment for the Apoſtles, and ſo for Biſhops, who call themſelves their Succeſſors, as well as ſerving of Tables, and other miniſterial duties was a full employment for thoſe whom he calls the Treaſurers of the Church; and therefore they ſaid it for themſelves, and left it as a Rule for their Succeſſors, even to Biſhops, and all other diſpencers of the Word and Sacraments, that it was not reaſon they ſhould leave the Word of God, and ſerve Tables. Which it ſeems was a *Non eſt Conſonum*, by the Law of God, juſt as by the Common Law of the Kingdom, a Writ was provided, declaring it to be likewiſe a *Non eſt Conſonum*, and to be *Contra morem & Conſuetudinem Regni*, that Clergy-men ſhould be employed in Secular affairs. This indeed I hinted at then, as I gave alſo ſome little touch at the Government of the Church by the Imperial Law, but not that I put any ſtreſs upon it,

it, but meerly to circumſcribe the Queſtion, and keeping it within limits, by a Negative, declaring what it was not, and an Affirmative, expreſſing what it was, how Biſhops in Parliament could not Judicially act in Capital Caſes.

Therefore were it all ſo as this learned Gentleman ſeems to infer, that in *France*, *Spain*, *Germany*, and thoſe Northern Kingdoms which he mentions, that Biſhops were joyned with the Civil Magiſtrates in ordering the Publick Affairs of thoſe Nations, and that they had a ſhare not only in the Legiſlative, but in the Judiciary part, as he alledgeth two Authors to prove it to have been in *France*, it would not be of any ſignification to decide our Controverſie, for what is this to us to regulate our Parliaments, and to operate on our Laws? But firſt for matter of Fact, as to *France*, to which I can ſpeak a little, having ſpent many years in that Kingdom, and I have, by way of diſcourſe, informed my ſelf from the Ambaſſadour who is here from that Crown, who doth aſſure me, that the Judges (whom they call Counſellors, and not Judges, as we do) who are Clergy-men, as many there are joyned with the others of the Laity, never ſit in that Chamber of Parliament, which trys Capital Cauſes, which they call the *Tournelle*. I believe the ſame may be obſerved in thoſe other Countries which our Author mentions, and I do not ſee how it could be otherwiſe, the ſeverity of the Canon Law being ſo ſtrict in the prohibition of it.

But

But as I ſaid before, the Primitive Chriſtians had that veneration for the Clergy, and eſpecially for the Biſhops, that they were ſtill joyned with the Civil Magiſtrate, in ordering the affairs both in Church and State. The matters of the Church, they determined Judicially, in Secular affairs, whether Criminal or other, only by way of Counſel, if the Civil Magiſtrate to whoſe Province they belonged, did not do his part. I am ſure it was ſo in *England*. *Brompton* in his Chronicle, recites the Laws of King *Athelſtane* in this particular: I cited his very words in the original in my former Letter, I ſhall now repeat them very faithfully in *Engliſh*. He ſaith, *It appertains of right to a Biſhop to promote that which is right, both concerning God and the World.* A little after he addeth, *He ought likewiſe diligently, together with the Secular Judges, to promote Peace and Concord.* And ſoon upon it, he hath this paſſage, *The Biſhop ought to be preſent in Judgement with the Secular Judges, not to ſuffer any buds of wickedneſs to ſprout, if he can hinder it.* His Preſence and his Counſel was rather a check upon the Judge, than to determine any thing in Secular affairs. Sir *Henry Spelman* is a little more particular in delivering unto us the nature of that mixt Court, it is in his Gloſſary upon the word *Comes*. *The Earl*, he ſaith, *did preſide in that County Court, not alone, but joyned with the Biſhop; he to deliver what was Gods Law, the other what was Mans Law, and that the one ſhould help and counſel the other: Eſpecially the Biſhop to do it to the Earl, for it was lawful for*

for him ſometimes to reprove the other, and to reduce him, bring him into order if he went aſtray. Then he tells us what the work of that Court was, that it had cognizance but of petty matters, *That the Earl had not cognizance of great mens buſineſſes, for ſuch matters are to be brought into the Kings Courts, he only judges poor mens Cauſes. Hence it is, that by our Law, Actions for Debts and Treſpaſſes are not to be commenced in the County Court, if it be for above the value of* 40*s.* It ſeems that in ancient times it was but one Court, but each Judge had his proper work, the Eccleſiaſtical Judge to diſtribute and deliver to them what was Gods Law, the Secular Judge, Mans Law. And ſo it continued till *William* the Firſt's time, who firſt ſeparated the two Courts, as appears by his Charter to Biſhop *Remigius*, which Mr. *Selden* relates in his Comment upon *Eadmerus*, p. 167. which he ſaith the King did **Communi Concilio Archiepiſcoporum ſuorum & cæterorum Epiſcoporum, & Abbatum, & omnium Principum regni ſui:** *In a Common Council, by the advice of his Arch biſhops, and the reſt of the Biſhops and Abbots, and all the great men of the Kingdom:* The words are, *Wherefore I command you, and enjoyn you by my Royal authority, that no Biſhop nor Arch deacon preſume to hold Plea in the Hundred Court any more upon the Epiſcopal Laws, nor bring any Cauſe that pertains to the rule of Souls before the Judgement of Secular perſons, but that whoever is queſtioned according to the Epiſcopal Laws for any miſdemeanour or fault, ſhall come to that place which the Biſhop ſhall chuſe and nominate for that purpoſe, and there ſhall make anſwer for himſelf,*

ſelf, and not in the Hundred Court, but ſhall, according to the Canons, and the Epiſcopal Laws, do that which is juſt and right both to God and to his Biſhop. This was again confirmed 2 *R.* 2. and ſo the Courts came to be divided, as they continue to this day. But nothing can be concluded out of that large Enumeration, of the Biſhops being admitted in thoſe ancient times to Publick Councils, which was more for their Advice, and Counſel and Direction, than to act any thing at all Authoritatively and Juridically, and leaſt of all to have any vote to determine any thing in Caſes of Blood, which the Canon Law made a *Noli me tangere* to them: I deny not, but before there were Chriſtian Magiſtrates, even in the Apoſtles times, the Miniſters of the Goſpel did many times interpoſe and reconcile differences and ſutes, which many times happened amongſt believers; as St. *Paul* ſaith, *Is there not a wiſe man among you, no not one that ſhall be able to judge between his Brethren?* Nor doth he exclude the Biſhops, that they may not come in as one of thoſe wiſe men: Yet 1 *Cor.* 6. 4. he ſeems to exclude them: For he ſaith, *If then ye have judgement of things pertaining to this life, ſet them to judge who are leaſt eſteemed in the Church.* Which doth ſeem to intimate, as if he meant not the Biſhops, for ſure they are not leaſt eſteemed. But doth any man think, that they were by this authorized to compel men to ſubmit to their Judgement, to puniſh or impriſon, or lay any corporal puniſhment upon them, if they would not? Indeed I cannot think ſo.

Nor

Nor do I find that St. *Auguſtine* was of that opinion, the term he gives to thoſe whom the Author of that Treatiſe will have to be Eccleſiaſtical Judges, doth not imply ſo much, rather the contrary methinks: He calls them *Cognitores*, which denotes rather one that took notice of ſuch differences, and would endeavour to compoſe them, than a Judge to determine them, which hath made me examine that paſſage more particularly. In his Comment upon the 118 Pſalm he ſaith, ſpeaking of thoſe who interrupted them in their enquiry into the duty which they owed to the Commandments of God, *Non ſolum cum perſequuntur, aut litigare nobiſcum volunt, verum etiam cum obſequuntur & honorant, & tamen cum ſuis vitioſis & negotioſis cupiditatibus adiuvandis ut occupemur, & eis noſtra tempore impendamus, efflagitant, aut certè infirmos premunt, ut cauſas ſuas ad nos deferre compellant, quibus dicere non audemus, dic homo, quis me conſtituit Judicem aut diviſorem inter vos? Conſtituit enim talibus cauſis Eccleſiaſticos Apoſtolus Cognitores, in foro prohibens jurgare Chriſtianos.* Here is nothing of coercion in all this, they acted not as Judges, nay, he complains that the Clergy-men themſelves were perſecuted, and compelled to go to Law; or if they ſeemed to ſhew them ſome reſpect, and would be ruled by them, and drew them from their occupations to compoſe things between them, they would not drive them away, and ſay, who made me a Judge between you? For the Apoſtle who forbids Chriſtians going to Law, makes the Clergy to be *Cognitores*, Referees or Umpires between them,

which is the greateſt act of Charity that can be, and moſt befitting the calling of the Miniſters of Gods Word. But what ſaith St. *Auſtin* a little after, *Good men he ſaith will hearken to us, and ſeldome trouble us with their Secular affairs, but others, qui inter ſe pertinaciter agunt, & quando bonos premunt,* **noſtra Judicata contemnunt**, *facuntque nobis perire tempora rebus eroganda divinis:* Good men will hearken to him, he ſaith, but thoſe who are perverſe do *Judicata contemnere*, deſpiſe his award of it; which ſhews he took not upon him any authority of determining any thing. And ſo in his 147th Epiſtle to *Proculianus* the *Donatiſt*, he hath this paſſage, *Et homines quidem cauſas ſuas Seculares apud nos finire cupientes, quando eis neceſſarii fuerimus ſic nos Sanctos & Dei ſervos appellant ut negotia terræ ſuæ peragant, aliquando agamus & negotium ſalutis noſtræ, & ſalutis ipſorum: Non de auro, non de argento, non de fundis & pecoribus, pro quibus rebus quotidie ſubmiſſo capite ſalutamur, ut diſſentiones hominum terminemus*, &c. Nothing plainer than that all this is purely out of good will a work of Charity to thoſe who deſire him to determine their Secular differences, in which the Clergy then had meerly an eye upon Gods Glory, the good of their own Souls, and of the Souls of thoſe for whom they took that pains. But all this is *Nihil ad rem*, let the Clergy have right or no right to judge of Secular Cauſes, it will not decide our Controverſie, Whether Biſhops in Parliament can meddle in caſes of Blood: *Hic Rodus, Hic Saltus*, if we do all extravagate, I muſt come back to this.

His

His next Chapter will be more to the purpoſe, it is concerning the Conſtitutions of *Clarendon*, and the Proteſtation of the Biſhops 11 *R.* 2. Theſe two particulars well cleared, and no diſguiſe put upon them, will go a great way: He begins with the Conſtitutions of *Clarendon*, which he conceives to be that Biſhops are thereby required to be preſent in the Kings Courts, as other Barons are, till they come to give Sentence as to diſmembring, or loſs of life, and his Method is to judge of them by theſe three ways: 1. The occaſion. 2. The plain ſenſe of the words, according to their true reading. 3. By the ſubſequent Practice upon this conſtitution in the Parliament at *Northampton* ſoon after.

1. For the occaſion, this Author is pleaſed to ſay, he can hardly believe I ſhould betray ſo much unskilfulneſs in the affairs of thoſe times, as to ſay, that the Biſhops did then affect ſuch a power of Judicature in Secular Cauſes, and I think I have good warrant to be of that opinion. *Petrus Bleſenſis*, whom this Author cites, as living in *Henry* the Second's time, and knowing the whole proceedings of thoſe Conſtitutions, complains of it ſufficiently. In the firſt and genuine Edition of them, Printed at *Mentz* in Quarto, publiſhed by *Buſæus* the Jeſuite in 1600, in his Treatiſe *De inſtitutione Epiſcopi*, p. 542. he hath this paſſage, *Illud cœleſtem exaſperat iram & pleriſque diſcrimen damnationis accumulat, quod quidam principes Sacerdotum & ſeniores populi licet non dictent Judicia Sanguinis, eadem tamen tractent diſputando & diſceptando de illis, ſeque*

ideo

ideo immunes à culpa reputant, quod mortis aut truncationis membrorum Judicium diſcernentes, à pronunciatione duntaxat & executione pœnalis ſententia ſe abſentant. Sed quid hac ſimulatione perniciosius eſt? **Nunquid diſcutere & definire licitum eſt, quod pronunciare non licet?** *This provokes Gods wrath, and heaps up upon many a danger of damnation, that ſome of the prime of Church-men, and Elders of the People, though they do not dictate Judgements of Blood, yet they debate them, and diſpute of them, and therefore repute themſelves free from fault, in regard they have withdrawn themſelves from being preſent, at the pronouncing and giving order for the execution of the penal Judgement, though they had before agreed to the puniſhment of Death, or loſs of Limbs. But what can be more pernicious than ſuch diſſembling? Can it be lawful to debate and to determine a thing, which it is unlawful to pronounce? Then he compares them to King* Saul, *that had reſolved upon the deſtruction of* David, *but would not that his hand ſhould be upon him, but that he ſhould fall by the hands of the* Philiſtines; *or to the Scribes and Phariſees, that cryed out againſt our Saviour, Crucifie him, Crucifie him, but ſaid it was not lawful for them to put any man to death.* Is not this as good as *Chaucer's* Fryer that this Author quips me with, *p.* 4.? I do not ſay that *Bleſenſis* blamed all the Biſhops for evading the Law in that manner, he ſaith they were *quidam Principes Sacerdotum*, ſome of the great Biſhops. But the Author would have it to be the Univerſal Practice and Opinion of all the Biſhops and Clergy to underſtand the Conſtitution of *Clarendon*,

rendon, that they might continue to ſit in Judgement till the Sentence was to be pronounced; and in the Edition of *Bleſenſis*, Printed at *Paris* in 1667. inſtead of *quidam* it is Printed *quidem*, but by a manifeſt error which carries no ſenſe with it, and the Marginal Notes in both Editions ſhew it, which is, *Abuſus Clericorum qui cauſas ſanguinis diſcutiunt*; marking out the abuſe of them that did ſo. This was obvious enough to the Author in his quotation of *Bleſenſis*, therefore he might have ſpared the cenſure of my unskilfulneſs in the affairs of theſe times, ſince I had ſuch a Leader to follow as *Bleſenſis*; and more have I cauſe to complain of his want of Charity to me, *p.* 31. taxing me with repreſenting thoſe conſtitutions very unfairly, which is an expreſſion of one engaged in a party, and not of one that only ſeeks for truth, but to ſhew his Reading and Learning, as I am afraid that Author doth, who raiſeth a great deal of duſt meerly to blind mens eyes, and miſlead them into errours; and thus he commends himſelf for ſpeaking mildly, and much good may his mildneſs do him.

It is apparent that the Clergy were then very high, having gotten a great head by the favour they had found from the Uſurper King *Stephen*, where on both ſides they ſerved one anothers turns, and *Henry* the Second, to bring things again into order, call'd that great Counſel at *Clarendon*, where, by the Advice of the Prelates and the Nobility of the Realm, a recapitulation was made of part of the ancient cuſtoms and priviledges under the

the former King, and particularly under his Grand-father *Henry* the Firſt, which for the future he would have to be obſerved in the Kingdom, and thus *Propter diſſentiones & diſcordias ſæpe immergentes inter Clerum & Juſticiarios Domini Regis & Magnatum Regni.* There were ſixteen of thoſe Articles, the eleventh was, that they ſhould hold their poſſeſſions of the King in *Capite*, *ſicut Barcmiam*; and ſhould be anſwerable to the King for their Services; and ſhould as Barons, *intereſſe Judiciis Curiæ Regis, quouſque perveniatur ad diminutionem Membrorum, vel ad Mortem.* Here we ſee the occaſion of that meeting at *Clarendon*, it was to remove all cauſes of difference between the Great Biſhops and the Civil Magiſtrates; let us now ſee what was moſt likely to diſpleaſe them, it's not probable it ſhould be for being reduced to ſtand upon even ground with the reſt of the Nobility, and great men of the Realm; but if in any thing they are made leſs, and abridg'd of the powers which the others have, it ſtands moſt with reaſon they ſhould be troubled at that; and to be forc'd to walk out of the Judgement-hall after they had cryed *Crucifige*, is a great leſſening of their figure, I think more than if they had not at all meddled in it. But this Worthy Author ſaith, I have made uſe of the moſt Imperfect Copy of *Matthew Paris*, and ſaith in the *Vatican* Copy, and ſeveral MSS. it runs thus, *Debent intereſſe Judiciis Curiæ Regis cum Baronibus, donec perveniatur* in Judicio *ad diminutionem Membrorum vel ad Mortem.* Now in my opinion, this makes more againſt

the ſenſe he would put upon theſe words, which is, that they may ſtay and have a hand in managing the debate upon the Evidence, and agreeing upon the Sentence, but muſt be gone when it is pronounced, (which as I ſaid before, I look upon as a greater ſcorn put upon them, as *Bleſenſis* ſaith, *Quid hac ſimulatione pernicioſius eſt, nunquid diſcutere & definire licitum, quod non licet pronunciare.*) For I ſhould think that mentioning **in Judicio** in the ſecond part ſhould not have a different conſtructionthan **Judiciis Curiæ** in the firſt part. For there the **Judicia Curiæ** which they may be preſent at, is to be underſtood of the whole proceeding, from the bringing in of the Charge againſt a Criminal perſon, to the pronouncing of the Sentence: And can it be rationally thought that **Judicium** in the ſecond place ſhould be meant only of the ſentence which is the principal part, and which the corruption of mans nature doth chiefly lead him unto. The Poet ſaith,

——Qui nolunt occidere quenquam,
Poſſe volunt——

This power of killing and ſlaying, *Poteſtas Juvandi & Nocendi*, is a pleaſing thing, and we are naturally angry with what abridgeth us of it. So I muſt conclude this point, that it's moſt probable the Biſhops were moſt ſcandalized at this eleventh Article.

Secondly, Let us conſider how to arrive at the true meaning of that conſtitution, which muſt be by comparing the paſſages of theſe times

times together, whereby we ſhall ſee how they underſtood it: You have already heard what *Petrus Bleſenſis* judged of thoſe who would retain that Image of Judicature, how much he blamed them, and what menaces of Gods Judgements he denounced againſt them, for the words of that Conſtitution were not ſo clear and poſitive that it gave not *Anſam diſputandi* to thoſe whoſe Inclinations led them to turn it into another ſenſe, and content themſelves to play at ſmall Games rather than ſit out altogether. So the Wiſdome of that time to make it yet more plain, and take away all ambiguity, moved the King to call another Great Council at *Weſtminſter* in the year 1175. eleven years after, *Ad Emendationem Anglicana Eccleſia ex aſſenſu Domini Regis & Primorum omnium Regni*; where the third Article is, *His qui in Sacris ordinibus conſtituti ſunt* **Judicium ſanguinis agitare non licet** *unde prohibemus ne aut per ſe membrorum truncationes faciant, aut inferendas judicent. Quod ſiquis tale fecerit conceſſi ordinis privetur officio & loco, Inhibemus etiam ſub interminatione anathematis, ne quis Sacerdos habeat vicecomitum aut præpoſiti ſecularis officium.* It is not lawful for thoſe who are in Holy Orders to act at all in Judgements of Blood, wherefore we forbid them to have any thing to do with taking off mens Limbs, or to judge of any ſuch thing. And if any do ſuch a thing, he ſhall be deprived of the office and dignity of his Orders: And we alſo forbid, under the pain of being Anathematized, that no Prieſt ſhall take upon him the Office of a Sheriff, or of a Secular Judge. This

makes

makes it out plain, what the ſenſe of thoſe times was; that it was not lawful for them to act at all in caſes of Blood; and this is as much the Law of the Land, as the Conſtitutions of *Clarendon*, or as any other Statute Law. But our Author, *p.* 42. quarrels at this, as only ſtanding upon *Roger Hoveden*'s authority, and wiſhes he had produced the whole Canon entire for it: Here you have two of our Ancient Hiſtorians that liv'd in theſe times, and agree *in Terminis* upon the relation of what there paſſed: But our Author is not ſatisfied, tells us the Council of *Toledo* makes an *&c.* and leaves out the prohibition, which declares the meaning and extent of their Canon: He will have this Prohibition, and Sanction of deprivation to attend only upon the latter part, that is, if they do joyn in pronouncing the Sentence: But where doth he find that diſtinction allowed, it is what the Clergy have framed and imagined to themſelves to give them ſome Power: Admit we ſhould allow them that, it makes it not the more lawful for them; there is ſtill a *Non licet*, which is ſubject to puniſhment, and though the Eccleſiaſtical Law doth not go to that height to cut off a Member, deprive him *ab Officio & Beneficio*, yet it may go leſs in a lower Sentence, however the Civil Sanction may impoſe what puniſhment ſuch a miſdemeanour may deſerve.

Cætera deſiderantur.

FINIS.

CONSIDERATIONS
Touching that
QUESTION,
Whether the
PRELATES
Have Right to ſit among the
LORDS,
And VOTE with them in
PARLIAMENT
I N
Capital Caſes,

When the Lords ſit in their Judicial way of Proceeding upon the Tryal of any of their Peers?

In which it is aſſerted, That they have no Right to Sit and Vote with them in ſuch Caſes; Neither can it be made appear, they have ever practiſed the ſame.

In Anſwer to the Reaſons and Records urged by the Learned Author of the

Grand Queſtion, &c.

LONDON, Printed in the Year 1682.

To the Reader.

THis Tractate which is now made publick, was written ſoon after the Publication of that Book intituled, The Grand Queſtion concerning the Biſhops Right to vote in Parliament in Caſes Capital, ſtated and argued, &c. It hath lain by the Author many Months, and ſhould ſtill have continued in the Dark had not the unſeaſonable thruſting into the World of a Book, called, An Argument for the Biſhops Right in judging in Capital Caſes in Parliament. For their Right unalterable to that place in the Government they now enjoy (by one Thomas Hunt Eſq;) ſtirred up the Pens of others, and the deſire of Friends, me among them, to aſſert, as I believe, the contrary Truth. I aſſure the Reader, I did not at all gueſs the Author of the Grand Queſtion, when I took into my thoughts the Conſideration of his Book. Fame hath ſince put it upon a Perſon of ſo great Worth and Learning in all ſorts of Literature, and for whom I have not only a particular Honour my ſelf, but the preſent and future Times will look upon as one of the greateſt Champions of the Engliſh Church againſt Popiſh Superſtition and Idolatry. I ſhould difficultly have been engaged in this Conteſt, did I not know the Modeſty and Ingennity of this Learned Perſon is ſo great, that he will not

take it ill to have his Reasons examined by a far less knowing Pen, which shall be always ready to submit to better Judgments.

I have examined this Author, Chapter by Chapter, have given Answers to his Reasons, and shewed the Infirmity of those Records he hath thought proper to urge for his Opinion, and have given some other of my own, not taken notice of by him, I hope material to that end for which they are alleged: I was not willing to trust too much to Abridgments; nor had either the Time or Convenience to search the Originals, and therefore had recourse for some to a very near Relation of my own, who is well stored with that sort of Treasure, and who never denied me the use of any thing in his well-furnish'd Library I desired from him. Truth is but one; but Men may vary in their Apprehensions concerning it. As to others which I could not be supplied with from him, I must acknowledg my self deeply obliged to my much honoured, and very learned Friend, *Mr.* William Petyt, *of the Inner Temple*, who was not only pleased to read over the ensuing Treatise, but to give me the sight of a rich Magazine of the Transcripts of Records which he hath fairly written by him, as also to give me the Copies of some, necessary to my purpose, which I either had not, or not so fully as from him. The World hath already seen something of his, and may in due time expect more, in Reply to the learned *Dr.* Brady, in whom I find various and useful Learning, but (if I may have leave to say so) one misled in some measure by different Notions of Words, and Interpretations of them, contrary to their

their known and common Acceptation. Some part of his Book hath been already considered by the Author of Jani Anglorum facies altera: *But the intire Answer to it we must expect from Mr.* Petyt, *who hath favoured me with the sight of a short Specimen of a greater Work to follow. I must not here forget my very deserving, and worthy Friend Mr.* Atwood *of* Grays-Inn, *whose Assistance I received in transcribing some Records for me. He is a Person whom God hath endowed with a good Estate, and a large measure of Knowledg, for the few Years he hath hitherto spent in the World, and who (I speak it to the shame of most of our young Men) spends his time in Studies useful to himself and to the Kingdom in which he lives. Having already seen from his youthful Labours so good Effects, we may well expect from his more mature Judgment things of greater Advantage to the learned part of this Nation.*

But let us now return to Mr. Hunt, *a good Protestant he appears to be in his Postscript, which in these unconstant times deserves Commendation; and in his Book, he shews himself a Man of various reading and learning, with a competent Knowledg in the Tongues, but otherwise, if I much mistake not, a Man of confused, and undigested Notions, by which he forces things to serve his turn, contrary to their true meaning, from meer Conjectures and Surmises of his own, without any colour of Demonstration. His whole Book consists of three Parts, Argumentative, Invective, or Reproachful and Extravagant, or Conjectural. I cannot com-*

pare his Argumentative Part better than to a gleaning after a full Vintage. There is nothing in it which had not been foreſeen by the Author of the Grand Queſtion, *and preſſed by him with much more Learning, Subtilty, and Cloſeneſs of arguing, or elſe wholly left out as unconcluſive to the matter he had in hand; of whom it may be ſaid, what was once of* Hector *in another Caſe,* Si Pergama dextra defendi poſſent, etiam & hâc defenſa fuiſſent. *What is by me ſaid in anſwer to his Arguments in this Treatiſe, muſt be left to the Judgment of ſuch as ſhall read it. The ſecond Part is invective, reproachful, and unſavoury, in which I would adviſe no Writer to follow his Steps. Soft Words, and ſtrong Arguments, may convince a Reader, whom railing Language will but exaſperate. I ſhall name ſome few of that ſort, that he may not think I accuſe him falſly.*

Page 7. *In his Preface he blames the Author of the* Grand Queſtion, *for treating his Adverſaries too kindly who deſerved ſharper Reflections then he hath given them.* 'Tis plain by the 25th Page of his Book, *that he knew the Octavo Gentleman, as he calls him, on whom he there ironically beſtows the Title of diſcreet Gentleman, and inſtances in his Talk againſt Biſhops, when he was young, which he could not leave when he was old. This Perſon he charges with Falſhood, unrighteous dealing, impoſing upon the People, Self-Condemnation, undue Art, and ſuch Stuff,* Pag. 13. *with a deſign to ſhut the Biſhops out of the Houſe; an Extravagant Surmiſe of his own, without any Colour given by the Author of*

Page 25.

Page 24.

Pag. 13, and Pag. 37, &c.

the

the Leter, Pag. 37. *want of Candor, Integrity*, &c. Pag. 38. *Iniquity, Prevarication, Petulancy, Spight, inveterate Diſpleaſure, Grinning, whetting his Teeth, and ſquinting upon them with an evil Eye, with much other ſuch Language throughout his Book, which the Reader may obſerve, if he pleaſes. He ought, with more Reaſon, to have conſidered the Age, the Quality, the Place,* this Octavo Gentleman *held at Court, the Service he had done his Country both at home and abroad, rather than to have loaden the Aſhes of a dead Noble-Man, with Revilings railing Language and Reproaches, who was known to be a Perſon of ſo great Worth, and Experience. The Reader will pardon this Warmth in me; when I hear a Perſon, now at reſt, ſo ſlighted, who, had he been alive, this little Gown-man durſt not have approached without marks of Reverence, and Submiſſion. But let us allow him to make up the ſhortneſs of his Reaſoning by the length of his Railing.* Page 38.

Thirdly, His Extravagancies are ſo numerous, that nigh every Leaf hath ſomewhat or other of that Nature, Conjectures, and Surmiſes, without any manner of Proof, muſt paſs for Demonſtrations. One while the Biſhops are Spiritual Barons, a Title I never remember given to them; nay, not ſo much as Lords Spiritual till the time of Rich. II. *Another time Feudal Barons, and that there was no other than Feudal Nobility: Sometimes they are* Barones Majores; *yet not enobled in Blood, nor their Honour conferred upon them by any actual Ceremo-* Page 119.

ny, or otherwiſe eſteemed than Barons by Tenure; and that William the Conqueror intended that as an Honour, which themſelves, and all other Hiſtorians complain of as a Burthen. That the Biſhops in Parliament are a full third Eſtate; and yet we know Acts are good when they are either excluded abſent, or oppoſe the paſſing them; and yet they never repreſented any but themſelves. Sometime he is troubled that the Nomination of the Biſhops is in the King. Theſe things curſorily obſerved by me, makes his whole Book appear an indigeſted Lump, fit to be lick'd over, if ſo it may be brought into any form. 'Tis not unlike a Lottery, where after a hundred Blanks, you may chance get a Prize: But I ſhall leave a further Examination of his crude Notions to another Hand, who may be more concerned to detect his Errors than I am: However, I cannot omit the taking notice of his pompous Title; 'tis indeed a Titulus Seſquipetulcus; Their Right unalterable in that place in the Government they now enjoy: which Fancy is confirmed by a Conſequence of his own making, Page 122, That the Biſhops cannot be detruded from that Place they bear in the Conſtitution of the Government: for that no Government can legally, or by any lawful Power be changed, but muſt remain for ever once eſtabliſhed, and it cannot be leſs then Treaſon of State to attempt a Change. No Authority in the World is competent to make any Alteration.

How falſe this Poſition is, he will find, if he conſult the frequent Change of Governments

ſince

ſince the Creation, in the Jewiſh, Grecian, Roman, *nay, in our Britannick State, with many others in all parts of the World. Neither can I imagine this Maxime can ſerve him to any other end, than to arraign thoſe Parliaments who have made Laws without them, or that in* 17 Car. 1. Anno 1642, *which by Act took away their Seats in that Houſe. And laſtly, to accuſe thoſe as Traitours to the State, if any hereafter ſhall attempt it. I am confident, no Parliament will endeavour to take from them their juſt Right; but to ſay they cannot, and that the Government cannot then ſubſiſt, is as abſurd, as the other is unlikely. I muſt further obſerve, that this Author doth upon all Occaſions blame thoſe Perſons, who deny the Prelates that judicial Power in Capital Caſes he would place in them as Enemies to the Government; whereas he ought to know, that* Exceptio probat regulam, in non exceptis. *He that gives them Authority in all things that are clear, and denies it them in dubious, doth more aſſert their Right, than he that by giving it them in all things, doth rather perplex it. I have now done with this unwary Writer, who whilſt he ſeems ſo zealous for the Government, doth himſelf in the main part of it unhinge, and deſtroy it. Doth he not,* Pag. 144. *endeavour to deſtroy the moſt ancient Court of Chancery, which he calls both a Reproach, and Grievance to the Nation? Doth he not ſpend ſome Leaves to ſhew how this may be effected? by ſetting up as many Chancellours as there ſhall be Judges in Courts, which muſt in the end, be either wholly*

uſeleſs, or run us upon an Arbitrary way of proceeding, and put an end to all our ancient way of Trials by Juries, and leave all in the Breaſt of the Judg to determine. Let him not now think to take off the Envy of this by a fawning commendation of our preſent Lord Chancellour. I am ſo well acquainted with the great Abilities, and large Endowments of that Noble Perſon, that I doubt not but his juſt Decrees in that Court will remain as perpetual Teſtimonies of his Conſcientious Juſtice, and Equitable Diſtribution of it in that place in which he is now ſettled. Nor can I believe he will be pleaſed with any, tho never ſo due Commendations, to the Diſparagement of his worthy Predeceſſors, or ſuch as hereafter may ſucceed him in the moſt Honourable Station in which he now is worthily placed.

DID

DId the Author of this Treatiſe believe that the Lord Biſhops voting as Judges in Parliament, in Caſes of Life and Member, could any way conduce either to their Honour or Greatneſs, or the Good of the Church and Nation, he would never have entred the Liſt in this Quarrel, being himſelf wholly conformable; and in his Judgment fully approving the Polity of the Church of *England*, as the beſt reformed of any other he knows, having cleared herſelf from the Superſtitious Formalities of the Church of *Rome* on the one hand, and on the other, not requiring from her Children, under Terms of Communion, any thing, in which ſhe may not lawfully as he thinks be obeyed. But being fully convinced, that their aſſerting this Right in themſelves, will bring forth no other Fruit, except Envy to their Perſons, and perhaps ſometime or other, through the unequal Affections of a headſtrong People, Prejudice to their Functions, I have been the more eaſily induced to make known my Thoughts herein.

I obſerve there have already been made publick ſix elaborate Treatiſes upon this Subject; four aſſerting a Right in them to vote in Parliament in matters of Blood, and two againſt it. But becauſe the laſt and moſt learned Tractate, which goes under

der the name of the *Grand Queſtion*, &c. is look'd upon, and indeed is the moſt material, I ſhall apply my ſelf chiefly to the Examination of his Arguments, and I hope diſcover the Errors, Fallacies, or Inconſequences of them.

Gr. Qu. p. 1. He tells us at firſt, that 'tis granted on both ſides, that the Biſhops ſit in Parliament by virtue of their Baronies. This I muſt take Liberty to queſtion as doubtful, ſtill premiſing that Truth doth not lye in what Men may ſay of themſelves, or paſſeth under common Eſtimation of Men, but what upon ſerious Examinition of the Queſtion ſhall be found to be true, I ſhall endeavour to make it appear, that many who held Lands in *Cap per Baroniam*, or, *per ſervitium Baronia*, were not enobled in Blood, nor had Right to demand their Writ of Summons as the Noble Barons had, but were to expect the King's Will and Pleaſure, and were often left out: Theſe were *ſecundæ Dignitatis Barones*, or Barons by Tenure only, of which ſome might probably be adopted into the *Nobilitas Major*, afterwards as *Barones adſcripti*, yet at firſt were not ſo; and this was to them an Honour, but to the Biſhops a Burthen, who held their Lands free before, and had no Honour conferred upon them as the reſt had. For tho it be true that all the great Noble-Men held *per Baroniam*; yet was it not their Tenure which gave them that Right, as I ſhall ſhew by and by.

Theſe

Theſe ſecond ſort of Barons were called Barons Peers, becauſe they held of the King *in Capite*, as his immediate Free-holders, and were ſtiled *Barones Regis*, for the Word imported then no more but Men holding of the King's Perſon *in Capite*. Theſe ſubdivided their Lands to others, under the like Military Service; theſe were likewiſe called Barons from their appearing at their Lord's Court, called the Court Baron; and *Baronagium* became a Word of general Signification, comprehending thoſe *liberè Tenentes*, or Sutors to the Court *Baron*, who together with the King's immediate Tenants, who were the *Barones Regis*, that is, the Kings immediate Free-holders, made up the *Communitas Anglie*, and comprehended all Perſons except ſuch as held in Villenage. Beſides theſe, thus made by the King, there were others, ſome found here, ſome brought out of *Normandy*, of great Nobility and Extraction, who had of their own, great Poſſeſſions, as Earldoms and Counties in this Country, and others brought over with the Conquerour out of *Normandy*, of an Inferiour Rank, to whom he gave the like Honour, out of the Lands of thoſe adhered to *Harold*, which all held of him *per Baroniam*, but by Creation were many of them afterwards made of a higher Rank, and were called *Comites Regis*, and *Majores Barones Regni*; they being poſſeſſed of the like Honours in their ſeveral Countries before.

fore. The Biſhops, I conceive, were not under any of theſe Ranks, but were called to Parliaments *ratione Epiſcopalis Dignitatis, not ratione Tenuræ*, only, of which they complained as a Burthen. Creation they had none to any higher Honour than Epiſcopal; their Tenure could not give them a greater Honour than to be *Barones minores*, or Barons, Peers. Neither can I find in any Act of Parliament or Record, that they were called Lords before the time of *Rich.* II. and then firſt called Lords Spiritual, to ſhew their Honour aroſe from their Spiritual Function, and not from any Temporal Poſſeſſions; nor the name of Barons applied to them except by themſelves, who perhaps finding the Burthen of their Service which before was free, were willing that others ſhould give them the Title, tho there was no more reaſon that their Tenure by *Baron* Service ſhould make them *Barons*, than that Knight Service ſhould make the Tenant a Knight. Having thus cleared my way, I ſhall in the next place, ſhew that theſe *Barones Minores*, or Barons Peers, were ſometimes ſummoned by Writs to Parliament, and ſometimes left out. The Abbot of *Feverſham* (one under the ſame Rule with the Biſhops) was ſummoned to 12 Conſecutive Parliaments as Tenant *in capite per Baroniam*, and then left out, 19 *Edw.* 2. *Rot. penes remem. Dom. Regis in Scall. Thomas de Furnival* had been ſumoned to 30 Parliaments, and yet upon an

Seld. Tit. hon. p. 730. 1 *edit* fol.

19 *Edw.* 2.

an Amerciment in the Exchequer, pleads he was no Baron: now except he had held *in Cap. per Baroniam*, or part of a Barony, he could not have been ſummoned at all as a Member of Parliament. Whether his Plea were allowed doth not appear upon the Record, but by this and ſome other Records in my hand to the ſame purpoſe, it ſeems to me that many that held *per Baroniam*, were not Barons, but at the beſt Bannerets, or Barons Peers.

I cannot find by my utmoſt ſearch, that any thing *hitherto* hath made it apparent, that Baronies were ever annexed to the Poſſeſſions of the Biſhops; but Men have generally taken it for granted, that they were ſo. They ſay that *William* the firſt, ſoon after his Reception to the Crown of *England*, did introduce new Tenures, and eſtabliſhed Counties and Baronies, and did then order that Biſhops, and the Parliamentary Clergy ſhould hold *per Baroniam*, or *ſicut Baroniam*, which the Learned Mr. *Selden* ſaith in the language of thoſe Times ſignified the ſame thing: For he ſaith, that *tenere de Rege in capite*, and *habere poſſeſſiones ſicut Baroniam*; and to be a Baron according to the Laws of thoſe Times, are ſynonimous: *Seld. Tit. Hon.* part 2. pag. 704, *Cook*, *Hakewell*, and others ſay they hold *per Baroniam*. But the Proofs, any that I have met with, offer to make good this Diviſion by *William*, or that Tenure *per Baroniam*, did infer more when a *minor* Baron

Seld. Tit. Hon. pag. 704.

Baron in my Judgment, are not cogent. What they urge is taken out of *Wendover*, and from him tranſcribed by *Matth. Paris.* He firſt greatly blaming the Act of *William*, hath theſe Words; *Epiſcopatus, & Abbatias, omnes quæ Baronias tenebant, & eatenus ab omni ſervitute ſæculari libertatem habuerant ſub ſervitute ſtatuit militari irrotulans ſingulos Epiſcopatus, & Abbatias pro voluntate ſuâ quot Milites ſibi, & ſucceſſoribus ſuis Hoſtilitatis tempore voluit a ſingulis exhiberi.* That is;

Mat Par. p 7. ult. ed.

He eſtabliſhed under Military Service all Biſhopricks, and Abbeys which held Baronies, and at that time had freedom from all Secular Service, inrolling them all, and appointing according to his Pleaſure what Souldiers in time of War they ſhould ſeverally find unto him, and his Succeſſors.

Mr. *Selden* finding the contradiction in theſe Words, that their Baronies which ſhould have kept them, as he thought, free from Secular Service, as the words import, were the only thing that bound them to it, thinks there ought to be a Parentheſis after *Baronias* (*in purâ & perpetuâ eleemoſina*) *& eatenus ab omni ſervitio ſæculari*, &c. and makes the words run thus: All Biſhops and Abbeys that held Baronies in *Frankalmoign*, and in that reſpect freed from all Secular Service, *&c.* And backs this Conjecture by the Authority of Mr. *Cambden*, who he conceives might have ſeen ſome Copy where thoſe words were. But he need not have

have put himſelf to the trouble of that Conjecture, had he tranſlated (*eatenus*) *at that time*, as the word ſignifies, and never that I know *in that reſpect*. However, finding further, that this would not take away all doubt, becauſe the words refer not to all Biſhopricks and Abbeys, but to ſuch only as then poſſeſſed Baronies, for ought appears of elder time, which he denies any did before the time of *William* the firſt, (of which perhaps more anon) doth believe that this Tenure was enacted by ſome Parliament in *William*'s time preceding to this, whoſe Journals, or Records are now loſt; yet adds for a further Proof, the Authority of an ancient Manuſcript in his hand (belonging it ſeems to the Abbey of *Ramſey*) of *Matth. Paris*, where over the Year 1070, are inſerted theſe Words: In this Year the *Servitium Baroniæ*, was impoſed upon *Ramſey*. This perhaps might equally concern other Abbies; yet ſeems but a weak Proof of the matter in queſtion as to the Biſhops, did not ſomewhat in *Ingulphus*, and the ſubſequent Practice, give ſome Light to the Buſineſs. But neither Laws nor Practice ought to be forced or ſtretched to a greater Latitude than the natural Conſtruction of the Words will bear.

Ad id temporis.

Mr. Hunt *thinks that the Tenure made them Barons, and that Tenure and Baronies were coincident.* Seld Tit. Hon. *p.* 699. *and* 700.

It cannot reaſonably be denied, but that in the Times of our Anceſtors, when Learning in Lay-men was very rare; that the Clergy bare a great ſway in the Councils of Princes and Great Men, who buſied themſelves

ſelves in little more then Feats of Arms, and Hoſpitality. But the Clergy, a wary and vigilant ſort of People, guided by the ſubtile Heads of *Rome*, under whoſe Banner they always fought; what under pretences of Piety, Satisfaction for Sins commited, Redemption of Souls out of Purgatory, and what not, captivated the Conſciences, and drained the Purſes of moſt of the ignorant Multitude. Nay, ſo holy was their Function, and ſo ſacred their Perſons, that no Secular Tribunal was by them thought ſanctified enough to queſtion their Actions, but they ſtill preſſed to be remitted to their own, or by their Appeals to *Rome*, fruſtrated the Deſigns of the Civil Magiſtrate. *William* the firſt being deſirous to put a ſtop to this exorbitant Pride, and growing Power of theſe Men, and yet not diſgrace their Calling, did (as before is mentioned out of *Mat. Paris*) ordain that the Clergy ſhould not be wholly exempted from all Secular Service, and probably might before that, have altered their Tenure, which moſtwhat before was in *Frankalmoign*, unto the Tenure *in capite ſicut Baroniam*, or in the nature of a Barony, by which they were made ſubject to ſuch Services as Tenants *in cap. per Baroniam* were tyed unto, and were called to Parliaments, and ſate among the other Noble-Men, and the Barons Peers, being firſt ſummoned thereunto by the King's Writ. Moſt Men have conſide-

conſidered the *Nobilitas Major*, or thoſe who conſtituted the Houſe of Peers under a threefold Relation. Firſt, as made Earls, or Barons by Creation, and an actual Ceremony of (*a*) inveſture of Robes, and a ſucceeding Charter, and Writ to attend in Parliament when ſummoned. The Charter comprehended ſome Limitation how the Honour ſhould go; or elſe ſome Penſion to the Barons to ſupport their Dignity and Title, of which you may ſee more Examples in Mr. *Selden's Tit.* of *Hon.* Part 2. Cap. 5.

(*a*) *This I take to be the only true of ennobling any body as to the* Nobilitas Major.

Seld. Tit. Hon. *par.* 2. *cap.* 5. *circ. finem.*

Such I conceive was that Charter made by King *Stephen* to *Mandevile* Earl of *Eſſex*, and renewed again by *Maud* the Empreſs: the like was that of *Miles* Earl of *Hertford*, granted by *Maud*, and renewed by *Hen.* II. which Charter only ſerved to convey the third penny of the County. Now theſe Charters being uſual as to Earls, which was the higheſt Degree at that time, and an actual Ceremony being alſo uſed in the making (*b*) *of Knights*, which was the loweſt degree of Honour; I ſee no reaſon but to believe that the ſame Ceremony of Invetiſture was uſed to Barons which was the middle Degree.

Vid. Els Med. *p.* 33.

(*b*) *See Mr.* Seld. *Jani Angl. facies altera ult. edit.* p. 51.

Some Light is given to this by conſidering the Charter granted to the Lord *John Beauchamp* of *Holt*, where the words are;

Ipſum Johannem in unum Parium, & Baronum Regni noſtri Angliæ *præfecimus volentes quod idem* Johannes, *& hæredes maſculi de Corpore ſuo exeuntes ſtatum Baronis obtineant, ac Domini de* Beauchamp, *& Barones de* Kidermiſter *nuncupenter. In cujus rei Teſtimonium*, &c. Here being in this Charter no words of Creation, but all in the Præterperfect Tenſe (we have promoted) muſt refer to ſome Act done before; and this Charter ſerved only to limit how the Eſtate ſhould go: Mr. *Seld. Tit. Hon.* Part 2. Cap. 5. *p.* 747. 1 *edit. in fol.* I know reckons this as the firſt Creation of a Baron by Patent, but doth not obſerve the words, nor his own Subſequent. Patents made to others where the words are in the Preſent Tenſe, and conſtituent of the Honour granted, (*viz.*) *Præficimus, conſtituimus, creamus*, we do create, promote, and appoint. Neither can I imagine what Right thoſe Ancient Barons, of which we have yet ſome left who were ſo before *Rich.* II. have to come this day in Robes, had not their Anceſtors been inveſted with them in their Creation, and different from thoſe of Earls. Now this as it was the moſt ancient, ſo was it the moſt honourable way of conferring Honours; ſo was it alſo the moſt noble, by which their Blood was not only enobled, but alſo all other Rights and Priviledges competible to that Degree were given unto them; and certainly we muſt make ſome difference be-

Seld. Tit. Hor. *pag.* 747.

tween

tween one made a Peer of the Kingdom by Charter, and one ſo called in ordinary Speech, of which Name, no Man in the Kingdom, but is in ſome ſenſe, capable; we being all Peers to thoſe of our own Degree. Now of theſe Peers thus enobled by the Inveſtiture of Robes; ſome were called to Parliament by Writ after the Ceremony of Inveſtiture had been performed, and had never any Patent to limit the deſcent of the Honour. Such had their Honour in fee-ſimple, and it went to the Heirs general, of which we have many Examples, where the Sole Daughter and Heir of ſuch a Baron, hath not only conveyed the Honour to her Deſcendents, but enjoyed the Title herſelf during Life. Amongſt many, I will only inſtance in one; *Charles Longueville*, Son and Heir to *Suſanna*, Heir general to the Barony *de Grey* of *Ruthin*, left only one Daughter named *Suſanna*, *Charles* her Father, was received in Parliament in his Robes in the latter end of King *Charles* the firſt, his Reign; he dying, left the foreſaid only Daughter, who after his Death, married Sir *Henry Yelverton* of *Eaſton. Manduit* in *Northamptonſhire* Baronet; Sir *Henry* died, leaving Sir *Charles Yelverton* Baronet, his Son and Heir then a *Minor*, *Suſanna* enjoyed the Honour during her Life; and at her Death, left *Charles*, ſtill under Age, who immediately poſſeſſed the Honour; and at his full Age, was called by Writ,

ſate in his Robes in Parliament till he died, which happened ſoon after his Age of twenty one, without any iſſue, leaving the Honour to *Henry* his Brother, and Heir, yet alive, and under Age. See Sir *William Dugdale*'s Hiſtory of the Baronage, Title *Lord Grey*, firſt Part, *pag.* 718, 719.

Dugd. Baron.

The ſecond way by which ſome have conceived Barons were made, hath been by Writ only, without any other Formality, or Ceremony whatſoever; and of this Opinion have been ſome Heraulds, and have contended, that by the Writ of Summons, the Perſon was enobled, and if his Deſcendents were ſo called for three Deſcents, the Blood was enobled, I conceive this Opinion to be erroneous: For it is againſt a Maxime in Law, that the King ſhould paſs any thing by Implication, and as unreaſonable to believe he might not have Liberty to require the Counſel of his Subjects without conferring an Honour upon them, he did not intend. Beſides it will hence follow, That during divers Parliaments of *Edw.* 1. almoſt all in *Edw.* 2. and many in *Edw.* 3. all the Judges, King's Serjeants, and many other were enobled, for they had the ſame Writ the Barons had, yet were never accounted ſuch; nay, were often after ſuch Summons omitted. The known Caſe of *Mounthermer* is very pertinent to our purpoſe, who having married the

the Relict of the Earl of *Gloſter*, who had a great part of the Earldom in Jointure, her Husband was ſummoned as an Earl during the Minority of her Son; but after he came of Age *Mounthermer* was ſummoned as a (c) Baron during his own Life, and after wholly omitted in his Deſcendents. If it be ſaid that his Summons enobled him, but in regard his Deſcendents were not called, the Blood was not enobled; what will they then ſay to the Caſe of *Radulphus de Camois*, who was ſummoned, and his Son after him in 7 *Edw.* 2. yet in 7 *Rich.* 2. *Clauſ. Memb.* 32. *in dors.* *Thomas Camois* the Grand-child, was choſen one of the Knights for *Surrey*, and diſcharged by the King's Writ, becauſe he and his Anceſtors were Baronets: and the ſaid *Thomas* was ſummoned, and ſerved in that Parliament, not as a Baron, but as a Barons Peer, or Baronet, which was an inferiour ſort of Honour, and ſignified the ſame thing that Tenants *in Cap.* did in the time of King *John*. But that theſe ſorts of Peers were ſometimes ſummoned, and ſometimes omitted at the King's Pleaſure. The only difference being that which appeared when they came thither, the one appearing, (*viz.*) The inheritable Barons in their Robes, the others not, but in Habits different from the Barons. Now that there was this difference, is made plain by thoſe Authorities ſhall be produced under

(c) *Query, Whether this Summons gave him other Title than a Minor Baron.*

7 Edw. 2.
7 Rich. 2.

7 Rich. 2.

Vid. Cot. Poſt. *ult. edit.* pag. 344.

the next Head, which is, that there were a ſort of Perſons called Barons, who were ſo by Tenure only, that is to ſay, who held of the King *in Cap.* and had ſuch a number of Knights-fees, and upon that account were ſummoned as Barons, or rather as Barons Peers; Mr. *Selden* ſeems to ſay in his *Tit. Hon.* Part 2. Sect. 17. *pag.* 690. That all Honorary Barons of that time whereof he ſpeaks, were for ought appears, Barons only by Tenure: The words are cautelous, and his Expreſſions, as became a Learned Man, warily ſet down. Firſt, Honorary Barons, (*viz.*) Such as had the Honorary Name of Barons, but not the Blood; for ſuch I take his meaning to be, becauſe he gives us no Definition of Honorary Barons, nor why, if it be admitted, that Barons had their beginning from the number of Knight's fees, which they held, why Earls had not the like beginning, who held of the King *in Cap.* as well as the others. Now that there was a clear diſtinction between Barons enobled in Blood, and thoſe that held only *in Cap.* the one we find called *Barones Majores*, the greater Barons; the other *Barones Minores*, leſſer Barons. The red Book in the Exchequer, or Remembrancers Office, attributed to *Gervaſius Tilburienſis*, ſpeaks of it as an undoubted Truth, *Quidam*, &c. Some hold of the King *in Cap.* things belonging to the Crown, to wit greater or leſſer

Sekl. Tit. Hon. *pag.* 690.

Barons

Barons. *Quidam enim de Rege tenent in Capite quæ ad Coronam pertinent, Barones*, ſcil. *majores, ſeu minores*; by which it appears they both held of the King *in Cap.* yet were diſtinguiſhed into greater or leſſer. *Fitſtephens* in the Life of *Thomas* of *Becket*, Chap. 11. mentions, *Secundæ Dignitatis Barones*, Barons of a ſecond Degree, *Matth. Paris*, Anno 1215, hath theſe words: *Summoneri faciemus, Archiepiſcopos, Epiſcopos, Abbates, Comites, & majores Barones Regni ſigillatim per Literas noſtras. Et præterea faciemus ſubmoneri in generali per Vicecomites, & Ballivos noſtros omnes alios qui in Cap. tenent de nobis, ad certum diem.* Here we ſee two different ſorts of Barons, the one ſummoned by the King's Writ, the other by the Sheriff. The firſt ſort by Writs ſealed by the Chancellor, the reſt by Writs to the Sheriff; yet both held *in Capite*: But certainly, *omnes qui de Rege tenent in Capite*, muſt be underſtood with a reaſonable Reſtriction. For it will be very evident to any Man who ſhall examine the Inquiſitions *poſt Mortem*, remaining in the Tower, that much Land held *per Baroniam*, was in the Hands of private Men, who were never reputed Barons; neither could theſe Inquiſitions be underſtood of Tenures from Meſne Lords, and not from the King, becauſe all Tenures *per Baroniam*, were Tenures *in Capite*, which muſt be from the King. Beſides, if the Tenure

Part 2. c. 13.

Fitſtep. c. 11.

Matth. Paris, Anno 1215.

of Land made a Baron, Why were not the Purchasers of those Lands by the King's Licence of Alienation, ever after the Stat. of *quia emptores Terrarum*, called to Parliament as Barons? The Case of the Earl of *Arundel*, 11 *Hen.* 6. will not mend the matter, for his Ancestor was created by Writ, and the Castle entailed upon him; so that he was called to Parliament not by having the Land only, but by virtue of the Creation of his Ancestor, and the Entail upon it. In so much, that I still conceive that the ancient Nobility (from whatsoever beginning it arose) was made inheritable by Creation, and Investiture of Robes; upon which sometimes followed Charters which directed how it should descend; and the Confusion in Historians hath proceeded from their not distinguishing Barons from Barons Peers, so called, not from their Parity in Honour, but in Estate and Tenure, but wanting Investiture, were called, or left out, at the Pleasure of the King. This Distinction is clearly mentioned in the old *Modus tenendi Parliamentorum*, printed by Mr. *Hakewell*. *Summoneri debent omnes, & singuli Comites, & Barones, & eorum Pares.* All Earls, and Barons ought to be summoned, as also their Peers. I know the Authority of this Treatise hath been questioned by some Learned Men, but by none with more violence and less reason than by Mr. *Prin* in his

Hakewell *pag.* 4

his fourth part of his *Regiſter of Writs*, p. 591. To which, eaſie Anſwers may be given, if we conſider the Tranſlators out of the *Saxon* Tongue, might eaſily tranſlate Words which they thought of an equivalent Signification, by words in uſe at that time; as *Wittena Gemot.* for Parliament, and the like. Others of as great Judgment, have as ſtrenuouſly defended the Authority of it. Sir *Edward Cook* in his Juriſdiction of the Court of Parliament, ſtrongly defends its Antiquity, and Mr. *Hakewell* pag. 135. teſtifies to have ſeen an Exemplification of it under the Great Seal of *Ireland*, in the time of *Henry* the fourth; teſtifying the ſame to have been ſent into *Ireland* by *Henry* the ſecond, for a Form of holding Parliaments in that Kingdom: So that we muſt either admit the Great Seal of *Ireland* to be forged, or confeſs the *Modus* as ancient as *Henry* the ſecond's time. Many admit that it was ſent into *Ireland* as a *Modus* for that Country, but was not ſo for *England*, which ſeems to me unreaſonable, it not being likely we ſhould give them a Patern different from our own, who now obſerve moſt of the Rules there given. *Daniel*, Anno 1133, in the Life of *Henry* the firſt, will tell you that in his time, the word *Parliament* began to be in uſe, after the Convocation of his Parliament at *Salisbury*, in the 15*th* Year of his Reign. Nay, much ancienter, even as

Plin. 591, &c.

Seld. Tit. Hon. *part* 2. *p.* 743

Cook's *Juriſ. of Courts.*

Hakew. Mod. *p.* 135.

Dan. Cron. *Anno* 1133.

as old as *Canutus*, (if we believe the old Book of Sir *Edmundsbury*) who in the fifth Year of his Reign, ſummoned all his Prelates, Nobles and Great Men to his Parliament, as you may ſee more fully, *Rights of the Crown*, p. 100. By all which of much more that might be added, we may ſee how dangerous it is to judg of Books by the promiſcuous uſe of words: I have made this ſhort Digreſſion, to the end that what I ſhall ſay hereafter, may be made clearer.

Rights of the Crown, p. 100. Cook's *Preface to his* 9th *Report ſets it out at large.*

I ſhall now apply my ſelf to the Caſe of the Clergy, and conſider their Right to ſit in Parliament. This Right of theirs muſt grow ſince the Conqueſt, from the Tenure of their Land *in Capite, ſicut Baroniam*, and conſequently, they cannot be reckoned but amongſt the Barons by Tenure, and are not properly Barons, but Peers, no way enobled in Blood, nor of longer continuance than the Foundation upon which the Tenure is built, continues. Thus we ſee in the Diſſolution of Monaſteries, the Tenure was extinguiſhed. The ſame in Biſhopricks, as that of *Weſtminſter*, and others, where the Corporation being diſſolved, the Tenure, as to them, was extinguiſhed. I know very well they would not now be thought to ſit *Ratione Epiſcop. Dignitatis*, as Biſhops, but as Barons. In

that

that famous Wrangle at *Northampton*, touching *Becket*, who ſhould pronounce Sentence againſt him, The Biſhops tell the Lords, *Non ſedemus hic Epiſcopi, ſed Barones; nos Barones, & vos Barones, pares hic ſumus.* Fitſt. *cap.* 10. *col.* 2. *Seld. Tit. Hon.* part 2. cap. 5. pag. 706. We ſit not here Biſhops, but Barons. (*d*) We Barons, and you Barons are here Peers, or Equals. Not meaning by theſe words, that they were otherwiſe Peers than ſuch as their Tenure made them, which was only to hold *in Cap. ſicut Baroniam*, or in the nature of a Barony; for although that *tenere per Baroniam, & ſicut Baroniam*, perhaps are all one, neither of them imply a Barony, but only the Services of a Barony, which the Biſhops, by their Tenure, were bound to perform, as alſo the Abbots. And I am the more confirmed in this Opinion, becauſe I do not find that any Examination was made what their Poſſeſſions were, nor of how many Knights Fees they conſiſted; but were they more or leſs, the Tenure was the ſame; whereas 'tis probable the Poſſeſſions of ſome were above twenty Knights Fees, the rate of an Earl, others leſs than thirteen, yet ſtill the Tenure and Peerage was the ſame.

Fitſt. cap. 10, *col.* 2. *Seld. Tit. Hon.* cap. 5. pag. 706.

(*d*) N. B. *their calling themſelves Barons, did not make them ſuch who were at firſt ſummoned* Ratione Epiſcopalis Dignitatis.

Neither

Neither is any Record, or Patent produced, nor I think can be, where any Barony was annexed to their Poſſeſſions. 'Tis evident that out of one Biſhoprick, others have been taken, as *Peterborough* out of *Lincoln*, *Oxford* out of *Gloſter*; yet theſe Biſhops came to Parliament, and ſtill under the ſame Tenure and Service. In *Edward* the ſixth's time, *Cranmer* had his Epiſcopal Dignity during Pleaſure, Was he then a Baron at will?

We may ſafely conclude from the Complaint of all Hiſtorians of thoſe Times, that Tenure *in Capite*, and their Services, which aroſe by it, was put upon them (*e*) as a *Burthen*, not as an Honour, but impoſed upon them to make them know they were Subjects, which they could hardly be brought to believe, having ſuch Dependance upon *Rome*. Yet was it not thought fit wholly to exclude them from all Councils, and therefore this expedient was found out, that they ſhould hold their Lands by doing ſuch Services as Barons did, and ſit amongſt them in Parliament in the nature of Barons, which they improved afterwards to the Appellation of themſelves by the name of Barons, but never could to equal Priviledges with thoſe Perſons who were truly ſuch. *Petrus Bleſenſis*, in his Tractate *de Inſtitutione Epiſcopali*

(*e*) *Vid. Rot. Fin.* 9. *H.* 3. *me.* 3. 12. *E.* 2. *Funivals c.* 18. *E.* 2. *Nevils c.*

pali, hath theſe words, which I have occaſion to cite more at large towards the end of this Treatiſe, *pag.* 129.

Quidam Epiſcopi, Regum munificentias, & eleemoſynas antiquorum, abuſivè Baronias, & Regalia vocant, & in occaſione turpiſſimæ Servitutis ſe ipſos Barones vocant.

Pet. Bleſens. yy. 2. *edit. in Quarto, or ſome Lines before, ſee after* p. 58, *and* p. 129. *b*] *wrongfully or contrary to the true uſe.*

Some Biſhops abuſively call the Bounties of Princes, and the Alms of their Anceſtors, Baronies, and Royalties; and taking occaſion from that baſe Slavery (he means certainly the Slavery in performing thoſe Services put upon them by their Tenure) call themſelves Barons. This he much, and largely inveighs againſt, from all which, it may reaſonably be collected that they gave themſelves that Title, rather than that it was given them by the King; who yet ſate in Parliament together with the other Barons, not as a diſtinct Eſtate from them, but involved with them as part of a third Eſtate, which was intirely repreſented in Convocation. For it ſeems to me very clearly, that they never were a diſtinct Eſtate in Parliament; if by Parliament you underſtand that part of it which conſiſted of Counts and Barons; yet were

Kelway, *fol.* 184. *ſaith, That the Convocation is not a part of the higher Houſe, neither the Biſhops any part of it, but ſit there as they have Temporal Baronies. But he doth not ſay the Convocation is not one Eſtate, or part of the Parliament, which however, is but the Opinion of a Serjeant at Law.*

they

they the chief and principal part of a third Eſtate in Parliament in reſpect of the Convocation, which began, continued, and ended with it; and where their Debates, Gifts to the King, and other Tranſactions bind only their own Body. Neither is it reaſonable to believe them a third Eſtate here, otherwiſe than they are ſo accounted in other parts of the World, to wit, a part of that Body the Clergy, who being a Select Portion, or Lot of the Lords, and Embaſſadours of Chriſt, look'd upon themſelves as not accountable to any Secular Tribunal. Neither is it material whether they ſate mixt with the Laity, as perhaps they have ſometimes done, for this cannot alter their being a third Eſtate, as Clergy-men, let their Votes be gathered together, or apart. Indeed I cannot ſee how it is poſſible they ſhould be a third Eſtate in that Houſe where they ſit among the Lords; for beſides their Unwillingneſs to own that they ſit as Biſhops, but as Barons; I would fain have any Man tell me, how it comes to be ſo. Dr. *Heylin* will tell you that *Clerus* was never taken for the Biſhops, diſtinct from the other Clergy: By what Title do they then claim it? by any Grant from the King that ſhould be produced by Uſage or Allowance? that's denied. Nay, the Impoſſibility is manifeſt: For I conceive by Law, the King cannot make an Eſtate, for if he could

Dr. Heylin's *Stumbling-block*

could, he might make a fourth, a fifth, or a ſixth Eſtate, and require conſent from them all to the making any Law which would alter the Frame of the Government. Mr. *Prin* hath very well proved them to be only a third Eſtate in Convocation, from the manner of penning their Grants there, (to wit) By the name of *Prelates, and Clergy of the Province of* Canterbury *and* York —— *orderly aſſembled in a Provincial Synod, or Convocation* —— *may be ratified, and confirmed in your Highneſs's Court of Parliament* —— *with the Aſſent of the Lords Spiritual and Temporal*, not Prelates, and Clergy, as in their Grant: *Prin.* fourth part of his *Kalender*, p. 594, 595. to theſe I might add many more Authorities *Caudrey's* Caſe *Cook* part 5. *p.* 8. *Clerus & tota Gens Laicalis*; but theſe eare enough, and I take it a full Anſwer to his ſeveral Records urged to that purpoſe, and for Explanation of the Author of the Letter, who when he ſaith they are a third Eſtate of the Kingdom, not of the Parliament; that is to ſay, not in that Houſe of Parliament where they ſit mixt with the Temporal Lords. But ſhould I admit them a third Eſtate in the Lords Houſe, as this Author, and others contend they are, and ſo a diſtinct Eſtate from the Lay-Lords, What colour can they then have to judg a Peer upon an Impeachment for Life, when themſelves,

Prin. *fourth p. Kal. p.* 594, 595.

ſelves, tho they ſit among them, are a diſtinct Eſtate from them, and ſo no way their Peers, which I take to be a very ſtrong Argument *ad Hominem*. I have thus paſt his firſt Aſſertion, and given Anſwer to his Conceit of their being a third Eſtate in the Lords Houſe; if by it he mean an intire third Eſtate, and not a part of it, as I ſaid before. For when they act in Convocation, they act with the reſt of the Clergy, as an intire third Eſtate, can they, that is, the Biſhops in the Lords Houſe, be more than part of a third Eſtate; where they vote not as Biſhops, but as Barons, as themſelves would have it? Certainly, we muſt not ſhut out the Convocation to repreſent the Clergy: if then the Biſhops in Convocation repreſent but a part of the Clergy, how they ſhould be an intire Repreſentative of them in another place, whilſt both are in being, is to me a Riddle.

Let

Let us now come to his argumentative part. After he hath climbed a Ladder of five Steps, he comes at laſt to this Concluſion: *That to ſit in Judgment with the Lords is not againſt* Magna Charta. What it this ſhall be granted him? Doth it thence follow, that they are ſuch *Peers* as are enabled to try thoſe in Capital Caſes who are enobled in Blood, and have inheritable Baronies in themſelves by Creation? *Magna Charta* is a general Charter, which directs the Proceedings in the Tryal of all men by their Peers. Who are Peers to one another, is not there the Queſtion; neither doth the Author of the diſcourſe of Peerage make any other uſe of it. *Gr. q. p. 2.*

The ancient Canons forbid them to meddle at all in ſecular Affairs: if therefore the Indulgence of Kings have admitted their Preſence in Parliaments in ſome Caſes, doth it thence follow, that they have Right to be there in all Caſes, or to try Peers for their Lives, to whom they are no way equal? The Author proceeds, and, in the next place, inſiſts upon the Forms of their Writs, which are of the ſame kind with thoſe of the other Barons, which being not limited nor reſtrained, neither ought their Power ſo to be. *Gr. q. p. 2.*

The Weakneſs of this Argument is very apparent; for, by this he may infer, that the Judges and ſome others had the ſame Right: for, Mr. *Eſſing* in his *Modus*, *pag.* 11. hath obſerved, that the Writs *Eſſ. p. 11.*

were alike to the Lords, to the Judges, and ſome others, in diverſe years of *Ed.* 1. in moſt of *Ed.* 2. and many of *Ed.* 3. But the Words of theſe Writs, though general, were to be interpreted by the Practiſe of the Court, and not contrarily. Again, there is a great deal of difference between giving Counſel in difficult matters, according to their Writ, and trying Men for their Lives; an Employment no way proper for Meſſengers of Peace, and Preachers of glad Tidings. Laſtly, the Earls and Barons are *Conſiliarii nati*, Counſellors by their Birth, and ſo have a natural Right to give Counſel in all Affairs being once aſſembled in Parliament; and for that Reaſon, upon the Death of the King, the *Nobilitas Major* have all equal Right to meet in Council, in order to a Succeſſor, ſo have not the Biſhops; nay, though Privy Counſellors, their Commiſſion ceaſing, they have then no Right to come into Council with the other Lords.

In the next place he ſaith, Men as certainly dye by Bills of Attainder, where the Biſhops have an undoubted Right to vote in their Legiſlative Capacity, and therefore to vote in Caſes of Blood is not incompatible with their Function. 67. 9. p. 4.

To this I anſwer, the Caſes are very different, as well to the matter of the Law as the Reaſon of it. For firſt, Cuſtom or whoever gave them Right to ſit in the Lords Houſe, in the Nature, or amongſt the

the temporal Barons, though Eccleſiaſtical Perſons, did not reſtrain them as to their Concurrence in the making new Laws, yet very well might as to their judging in ſome Laws already made: ſo that the one is agreeable to the Laws of the Kingdom, and the Laws of Parliament, and the other not ſo: And if any thing in that Particular had been contrary to the Holineſs of their Calling or their Rules of Living, it had been fit for them to have informed the King and Lords, and not for them to take notice of it otherwiſe. Nay, in that very Caſe, when that Bill ſhall come to be paſſed into a Law, by the King, the Lords Spiritual ought to abſent themſelves, as it was held by Mr. *Bagſhaw*, a Reader of the *Middle-Temple*, in the time of Arch-biſhop *Laud*, by whoſe Power, he was then prohibited from farther Proceedings in his ſaid Lectures. *Ruſh. Hiſt. Collect.* part 2. pag. 990. *Hiſt. Coll. part. 2. pag. 990.*

Secondly, the paſſing a new Law, be it what it will, doth not immediately, but by Conſequence may concern Blood. Now the Biſhops, who are always ſuppoſed to incline to Mercy rather than Severity, may perpetually, with a good Conſcience, hinder the paſſing ſuch a Bill as ſhall puniſh a Delinquent with Death who had not capitally offended before. But, when once a Man is capitally impeached for tranſgreſſing a known Law, and Iſſue joyned thereupon, 'tis not now in their Power, with a good Conſcience, to ac-

quit the Guilty, becauſe they muſt there opine according to the Proofs before them, which is a very ſtrong Argument why they might be permitted to be preſent in the one Caſe, and not in the other. Laſtly, if this way of arguing were good, it would follow, that the Commons ought to have equal Power with the Lords in all other Caſes, becauſe they have with them an equal Power in paſſing Bills.

Gr. q. p. 6. The next Section conſiſts in blaming the Inſinuation of his Adverſary, who ſaith, their medling with ſecular Affairs was againſt the Apoſtles Practiſe, though in a matter concerning the Church; mentions the Reſcript of *Honorius* and *Theodoſius*, and ſo paſſeth that point. In which, it appears he inſinuates no more than *William* the Firſt ordained, who appointed that they ſhould meddle with nothing but what concerned the rule of Souls, and govern themſelves according to the Rules of the Church, ſo that you ſee the Canons of the Church were conſidered in their Admiſſion to ſit.

Vid. Dan. p. 35. 46. Baker p. 26. & 30.

What he ſaith in Oppoſition to this, is, that it is a part of God's Service to do Juſtice and Mercy, and to attend the publick Affairs of the Kingdom, when they ſhall be thereunto called: that the Biſhops now are not under the ſame Circumſtances the Apoſtles were when the Chriſtian Church was to be planted, and now when it

Gr. q. p. 6.

it is conſtituted: that the Apoſtles travelled from Place to Place, which the Biſhops are not now bound to do: that the Clergy are one, yea, the chiefeſt of the three Eſtates, and therefore reaſonable they ſhould be concerned in the Affairs which concern the whole Nation; and after that, produces Examples out of the Practiſe of other Nations: (which at beſt ſignifies nothing to ours) neither is what he ſaith any way argumentative to his Advantage, except he had firſt proved that he that firſt appointed them to preach the Goſpel, and attend the Affairs of the Church, did not think that Employment enough to ſpend their whole time in. And although the Apoſtles, who were Meſſengers, did go about their Errands to ſeveral Places whither they were ſent, it doth not appear that St. *James*, who was a Biſhop, and not an Apoſtle, except we ſhall call him the Thirteenth, ever parted from *Jeruſalem*, but attended the buſineſs of the Church there. But, ſince this Author hath thought fit to put us upon this Queſtion, let us examine it a little higher.

N. B. Here he makes the whole Clergy to be one of the three Eſtates.

'Twill be undoubtedly agreed on all hands, that our Saviour did not delegate to others a greater Power than God had given him the Exerciſe of to himſelf. But it is clear in the Caſe of the Young Man, *Luke* 12. 14. who would have had him command his Brother to divide the Inheritance with him; *Man, who made me a*

Judge, and a Divider? That is, none hath made me ſo, becauſe his Kingdom was not of this World; that is, conſiſted not in ſecular things. The next place I ſhall remember, is 2 *Ep. Tim.* chap. 2. verſ. 4. *No man that warreth intangleth himſelf with the Affairs of this Life, that he may pleaſe him that hath choſen him to be a Souldier.* *Hugo Grotius* upon this place will tell you, that this is a Similitude taken from the *Roman* Law, which would not ſuffer any Souldier to be employed in any Affairs, but Military, quotes the Law and the Practiſe; tells you out of *Florus*, that *Poſthumius*, a man of conſular Dignity, was puniſhed for appointing his Souldiers to aſſiſt him in his Field. 'Tis true, the Words are general, but being applyed to *Timothy*, who was then employed in a Spiritual courſe of Life, they cannot think to pleaſe him who ſet them on Work, if they be engaged in ſecular Matters, which have not ſome immediate Reference to the Church: And, I believe no temporal Prince would take it well that his Ambaſſador ſhould engage himſelf in the Affairs of any other Prince, without his particular Commiſſion. This Senſe is generally embraced, though in our Queſtion we exclude not all ſecular Matters, but Blood only.

The third place I will mention, is the ſeventh and eightieth Apoſtolick Canons, *Epiſcopus, Presbyter aut Diaconus nequaquam ſecula-*

ſeculares curas adſumat, ſin aliter dejiciatur. Let no Biſhop, Presbyter, or Deacon, at any hand take upon him the Care of Secular things; and he that doth, let him be depoſed.

I ſuppoſe here are ſome Teſtimonies more than a thouſand years ancienter than any Council of *Toledo*, againſt their medling in Blood: for, *Qui includit omne excludit nihil.* If all ſecular Employments be forbidden, then the medling in Blood is not excluded. It cannot ſeem to me reaſonable, that we ſhould uſe thoſe Arguments as Biſhop *Davenant* and others do againſt the Uſurpation of the Pope, in things of this Nature, which may with as much force be retorted upon our ſelves. I am not ignorant what is uſually replyed by men of a contrary Judgment, and hath been learnedly and candidly put together by the Author of the *Honour of the Lords Spiritual aſſerted*, who hath written with more Clearneſs and equal Reaſon, I think, to thoſe of that ſide who have come after him.

Far be it from me to envy the Honour of the Clergy in their ſeveral Degrees and Orders, or to think the Ambaſſadors of God ſhould live baſely or ſordidly, and not be uſed with all due Reſpect among men. Neither is it any way reaſonable, that they who in an afflicted Church lived upon the general Contribution of the Saints, ſhould be put to ſuch Streights in a

flouriſhing one: but all this is to be underſtood with that neceſſary Limitation, that no Employment ſhould take them off from their main Buſineſs, the Care of the Churches committed to their Charge.

If they can ſatisfie themſelves that their Spiritual Work is not enough to take up their whole time, let them in God's name be engaged in ſecular Offices: but I think if the greateſt part of their Power were not transferred to their Chancellors and Lay-officers, there would be time little enough left them for ſecular things. I remember to have read in a Book called *Il Nipotiſmo*, (the deſign whereof is to ſhew the Corruption of the Church of *Rome* in the matter of their Nephews) that about 226 years after Chriſt, when the Clergy began to appropriate Lands to the uſe of the Church, they began to grow proud, covetous, and negligent in their over-ſight of the Churches: to the ſame Purpoſe you may peruſe a Book of *Father Paoles de materie eccleſiaſtiche*. And truly, this is the general complaint of *Petrus Bleſenſis* (an Author our learned Adverſary makes ſome uſe of) in many of his Epiſtles and Sermons, inſomuch, that I wiſh there were not Truth in that Report, that upon the too great Splendour of the Churches, Poiſon was ſowed among them.

Il Nipotiſmo de Roma. p. 37.

Pad. Paol's de materie eccleſiaſtiche.

Certainly this Kingdom hath given them a great ſhare in the Government, which hath not only allowed them the

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firſt Rank in the Eſtates of the Nation, but hath by Law made them appear to be ſo in the Convocation, where they have both an upper and lower Houſe; where they give Subſidies, make Laws for the Church, and where a part of them ſit among the Lords, not only to preſs the Allowance of thoſe Laws by the Civil Power, but alſo to have their ſhare in making new ones.

This, one would think were enough to content them without deſiring to have a Judicial Power in Caſes of Blood, which I doubt not to prove is by Law forbidden them.

But, I fear the charging this Deſire upon them is rather an Artifice of their Enemies, who by affixing this Calumny upon them, which indeed is not their Deſign, labour to leſſen them in the Eſtimation of the World, and by that means bring into Contempt both their Perſons and Callings. Our Biſhops Rights. *pag.* 61.

Many Examples I confeſs are given, where Chriſtian Emperours and Princes have made uſe of the Service of Biſhops as Counſellors, Chancellors, and Chief Juſtices, and the like; but upon Examination it will appear, that as to our own Kingdom, the Offices of theſe Perſons were much miſtaken. The Office of *Capitalis Juſticiarius Angliæ*, was not to ſit and judge Cauſes among Aſſociates, as at this day, but was the Chief Officer of the Nati-

Nation, had the Appellation of *Prorex*; and had Power, in the Abſence of the King, to diſplace any Officer of the Cinque-Ports, and to do any thing as Vice-Roy and Protector of the Kingdom; of which, ſee at large Sir *Henry Spelman*'s Gloſſary, in the Word *Capitalis Juſticiarius*. Upon Examination it will be manifeſt, that when they ſate in any ſuch places, their Service rather was to direct the Conſcience, to make amicable ends of Controverſies, to preach Peace to others, and purſue it themſelves, till the Subtilty of *Rome* turned Religion into Policy, and deſtroyed the Power of it. How far the Edicts of Princes were binding, is not my Task to enquire, but only how far that of their not medling in Blood was a part of the Law and Cuſtom of this Kingdom, and obſerved here. But, what I have ſaid in this Chapter, eſpecially as to the Baronies of Biſhops, I have delivered by way of Propoſal, not Determination, and upon a clear Anſwer of my Reaſons, ſhall be ready to retract any thing I have written.

Spel. Gloſ. verb. Cap. Juſtic. Co. 2. Inſt. p. 26.

CHAP.

CHAP. II.

I Come now to the Examination of his ſecond Chapter, in which, the Recognitions made at the Parliament held at *Clarendon*, come under Examination, together with the Proteſtation made 11 *R.* 2. I call it a Parliament, becauſe I find it generally ſo eſteemed by our beſt Lawyers, and I think denyed to be ſo by very few. Mr. *Selden* calls it that great Parliament at *Clarendon*, *Tit. Hon. part.* 2. *ch.* 5. *f.* 703. the firſt Edit. in fol. *Coo.* 2. *Inſtit. ch.* 2. *p.* 6. and in many other places. *Hoveden* ſaith, there met *Clerus* & *Populus Angliæ*. Where note, he makes *Clerus* comprehend Biſhops, Abbots, and all Eccleſiaſtical Perſons, and *Populus* both Lords and Commons, contrary to what Dr. *Brady* hath aſſerted, but very weakly proved. *Seld. tit. hon.* part 2. P. 703.

But before I enter into a more narrow Examination of this Statute, I think it not amiſs to give a ſhort Account of the Hiſtory of thoſe times, from *William* the Firſt, to the tenth year of *Hen.* the Second, when this Meeting was, with Relation only to the King and the Church. It will not be denyed, that *William* the Firſt diſclaimed all Title to the Crown of *England* by Conqueſt, and ſwore to obſerve the Laws of *Edw. the Confeſſor*, which were our Laws before: yet notwithſtanding, it

What Dr. *Bradies* Fancy is in that Particular, let him make good, if he can.

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is generally agreed, that he erected Tenures in *Capite*, and Baronies, and that amongſt others he obliged the Biſhops who before held their Lands in *Frankalmoign*, to do Service to his Courts, and to hold their Lands in *Cap. ſicut Baroniam*, and not to make their ſo frequent Appeals to *Rome*, and Journeys thither, without his Licenſe, being a thing contrary to the known Laws of his Kingdom; which is made evident by Sir *Edward Cook* in *Cawdreys* Caſe, and Sir *Roger Twyſden* in his Vindication of the Church of *England*, in point of Schiſm. Theſe were the *Servitutes eccleſiaſticæ*, and the *Peſſimæ conſuetudines*, ſo much complained of by *Mat. Paris* and other Monks of that Age. But however, ſo it ſtood during the Times of *Will.* the Firſt, *Will.* the Second, and *Hen.* the Firſt; after whoſe Death, *Stephen*, without any Right, (and contrary to their Oaths made to *Maud*, Daughter to *Henry* the Firſt then alive) by the Aid of the Biſhops gets into the Throne, and by their Power, was kept there till a Compoſition was made with *Maud*. In Recompence of this their breach of Oath, *Stephen* frees them and the reſt of the Clergy, from anſwering in any other Courts but Eccleſiaſtical: by which, they now look'd upon themſelves as free from the ſecular Power, becauſe they were anſwerable for no Offen-

Co. Cawdreys Caſe. *Twyſden's* Vind. of Schiſm.

In a Parliament held at *Oxford*, *Anno* 1136. he grants by his Charter, under his Hand, That all Perſons and Cauſes Eccleſiaſtical, ſhould appertain only to Eccleſiaſtical Judges.

ſences, but in their Courts. In this State of things *Stephen* dies, and *Hen.* the Second, Son to *Maud*, according to Capitulation, is received to the Crown; who, after he had ſetled his Affairs in *Normandy*, reſolves to do the like in *England*: but, fearing ſome Oppoſition to his Deſigns might ariſe from the Clergy, he firſt calls together an Aſſembly or Council at *Weſtminſter*, in the ninth year of his Reign; where he propounds, That all ſuch of the Clergy as ſhould be taken, and convicted for any heinous Crime, ſhould loſe the Priviledge of the Church, and be delivered to the civil Magiſtrate, to be puniſhed for their Offences, as other the Kings Subjects were. To this, the Arch-biſhop *Becket*, with the reſt of his Brethren, refuſed to give their Conſent, as being againſt the Liberties of the Church, which were confirmed to them by King *Stephens* Charter. This Anſwer put the King to a ſecond Queſtion; Whether the Arch-biſhops and Biſhops would ſubmit themſelves to the Laws and Cuſtoms obſerved by them in the time of his Grand-father, *Henry* the Firſt? They anſwered equivocally, They would; their Order, the Honour of God, and the Holy Church in all things ſaved: with which Anſwer, the King was more enraged. But, the News of this Breach coming to *Rome*, the Pope writes, and ſends a Meſſenger from *Rome*, charges the Arch-biſhop to make Peace with his Lord

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the King, and to promiſe to obſerve his Laws without Exception. The Arch-biſhop thus humbled, repairs to the King at *Woodſtock*, and there promiſes to obſerve the King's Laws ſo far forth as was required. Upon this Submiſſion, the King, having before broken up his Council at *Weſtminſter*, ſummons this Parliament to meet at *Clarendon*, in the tenth Year of his Reign, where he gives in Charge, that they ſhould call to Mind, and put in Execution and Writing the Laws of his Grandfather, *Henry* the Firſt. Of which, theſe following were the chief. Firſt, that there ſhould be no Appeals to *Rome* without the Kings leave. That Lay-men might handle caſes of Tithes. That no Arch-biſhop or Biſhop ſhould excommunicate any perſon who held of the King in *Cap.* or interdict any official of his without his leave, *&c.* The eleventh of them was at large what we have now under Conſideration; which I ſhall repeat and tranſlate as it ought to be, by and by. But, by this ſhort Relation I have made of the Hiſtory of thoſe Times, it may appear plainly, that their yielding Obedience to the known Laws of the Kingdom in matters of Appeal, appearing and anſwering in the King's Courts, (though it were the ancient Uſage and Cuſtom of the Realm) was the thing that moſt vexed them, and not how far their Preſence was required in caſes of Blood, brought into

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Parliament, in which they were contented to be limited by the Uſage of that Court, and to afford or forbear their Preſence, according to that Obligation which was incumbent upon them from the Canons of the Church, invigorated by the conſtant Uſage of the Nation. If therefore, I can make it good, that the Biſhops had no Right to be preſent in the Debate, and handling matters of Blood, and that that was the known Law, and the Senſe of this Act now before us, and of the ſubſequent Proteſtation in 11. of *R.* 2. I ſhall think my ſelf competently ſafe, though ſome ſeeming Precedents and Records ſhould be brought againſt me: for, it is the Law muſt be the Meaſure and Standard of our Actions, and not always Records; the Reaſons whereof, are ſometimes obſcure, and the matter it ſelf many times ſhortly rehearſed, and not always legal. I muſt confeſs, this Author hath much laboured to fix a Senſe upon this Article ſubſervient to his Purpoſe; but the more he ſtruggles the more he is intangled. 'Tis worth Obſervation, that four or five, I ſuppoſe, different Perſons, have written in the Defence of the Biſhops Right to vote in Capital Cauſes in Parliament; and having all of them a neceſſity to ſay ſomething to this Law of *Clarendon*, do all of them give different Interpretations of the meaning of it: a great Argument of a weak Cauſe. The firſt, whoſe Title is, *The Honour of the*

the Lords Spiritual, &c. I presume being satisfied with the general Sense which was put upon these Constitutions from all times, from which it is always unsafe to vary, and perceiving that those illegal Priviledges granted to them by King *Stephen*, were, by the reviving the Laws of *Henry* the First, abolished, doth ingeniously confess in three places, *pag.* 26. at the end of the sixth Chapter, and in the same page at the beginning of the seventh *Chap.* "That "at *Clarendon* their Wings were indeed "much clip'd, yet the Priviledge of sitting "and voting in Parliament, is left intire to "them; and tho' they never of late voted "in Capital Cases, yet they have ever "made their *Proxies*, as he hopes to make appear. In Chapter the seventh he hath these words, "We confess as before, for that "they were Spiritual Persons, they were "not to sit in Capital Causes and loss of "Limb; but adds, that long before they "had exercised this Power. By which Words, it appears, that in the Judgment of that Author, whatever their Power and Practice was before, yet that now by the Laws of *Henry* the First recognized, at this Parliament at *Clarendon*, that Power was taken away, and not since practised. That they had such Power before, he endeavours to prove out of *Compton* and *Spelman*, neither of which Authors, make good any more, than that the Bishop was Assessor with the Earl in the County-court; which

Hon. of the Lords. *p.* 26.

which was only to adviſe him in point of Conſcience; not much unlike the Offces of our Surrogates, who ſit in conſiſtory with the Biſhops Chancellor, in whom we know reſides all the Power. That this is ſo, appears by the Laws of *Edgar*, put out by Mr. *Larbert*, who in his fifth *Chapter* hath theſe Words. *Centuriæ comitiis quiſque ſit antea præſcribitur intereſto——— Celeberrimus autem ex omni Satrapia bis quotannis conventus agitor: cui cuidem illius Diœceſis Epiſcopus & ſenator interſunto, quorum alter jura divina, alter humana populum edoceto.* By which, we ſee 'twas the Office of the Biſhop to direct the People in Divine Laws, as it was of the Senator or Earl to teach them Humane: of the ſame Opinion is Sir *Edward Coo.* 2 *Inſtit. p.* 488. *Stat circumſpecte agatis.* Laſtly, *Chap.* 8. *pag.* 32. he mentions the Council at *Weſtminſter*, that in regard they might not *Agitare judicium ſanguinis*, they had many times forborn to meddle in ſuch Matters. The whole Chapter is concerning Bills of Attainder: now whether he meant that in ſuch caſes they did ſometime abſent themſelves, let himſelf explain. This Author not fore-ſeeing the Advantage would be made of theſe Conſtitutions, or elſe, hoping to help himſelf upon the Power they had to make *Proxies*, doth ingeniouſly confeſs the Truth, but is deſerted by all thoſe of his Side who follow him. The Author of the *Rejoinder*, *p.* 5. tells you, that

Laws of *Edg.* ch. 5.

Coo. Mag. Cha. p. 488.

Rejoin. p. 5.

the Conſtitutions of *Clarendon* permit the Biſhops to be preſent, and vote till it comes to loſs of Life or Member, which is not till the paſſing of Sentence upon the Priſoner. I believed the loſs of Life and Member was the Execution, and if they may be there, and vote till then, they may be preſent as long as any other; for when that is given, all go away: but, if his Meaning be that they ſhould go away when the Sentence is to be pronounced, the precedent Words will not bear that Conſtruction: ſo that according to him, this is rather an imping than clipping the Wings of the Biſhops, as the former Author affirmeth. Beſide, this Expoſition is contrary to the Votes of the Lords, who tell you, they muſt go away when their Lordſhips proceed to voting Guilty or Not Guilty, which is before the definitive Sentence, which is always given in the Preſence of the Priſoner, the other not. *Vide Journal of Parl. pag.* 258. 15 *Maii*, 1679. in which, they explained a former Vote, made by their Lordſhips, 13 *Maii*, 1679. in which, they had voted that the Lords Spiritual had Right to ſtay in Court in Capital Caſes, till Sentence or Judgment of Death came to be pronounced: by which, you ſee the Houſe of Lords have diſowned that Senſe our late Interpreters would put upon the Words of this Conſtitution, though themſelves before had given colour to that Interpretation. Our

Jour. of Parl. p. 258.

third Author, intituled, *The Rights of the Bishops*, fairly passeth over this Law, only tells you, that a Bishop pronounced Sentence against *Becket* in case of Treason, as *Fitzstephen*, a grave Author, saith; and farther tells you, That though the Prince may indulge many Priviledges to his Clergy, as this of not compelling them to vote in Parliament in cases of Blood, where by the Canon Law they are prohibited, yet that Law, must yield to the Law of the Land, (but how if the Canon Law be part of the Law of the Land, what's then to be done?) which cannot devest the King of his Right of using his Subjects, Clerks, or not, in any Places or Employments he shall think fit to employ them in; or in which he may think them capable of doing Him or the Publick any Service. This I confess is plain dealing, and I wish it were not too much the Sense of some of our greatest Clerks, that let the Law be what it will, it cannot bind the King's Hands from making use of any of his Subjects in what he pleases, though the Employment be forbidden by Law. This is the Meaning our third Author gives of this Constitution; and much good may it do him.

Bishops Rights. p. 139. 141.

Our last Author, in his *Grand Question*, comes next to be examined, in which I shall be more large, because in him is concentred what the rest have said, and his Cause defended with much Learning, and variety of Reading.

Gr. q. p. 19. He names the Conſtitutions of *Clarendon*, and the Proteſtation in 11 *R.* 2. as the two main Laws againſt him. The Conſtitutions of *Clarendon* (which were no more than a Recognition of the ancient Laws and Cuſtoms of *England*, not made, but revived by *Hen.* the Firſt, and now confirmed by his Grand-ſon *Hen.* the Second) he conſiders as the moſt material, and is content this Cauſe ſhould ſtand or fall by them. He tells you, the Conſtitution in Debate is the eleventh in number; of which, the Words are,

Archiepiſcopi Epiſcopi, & univerſæ Perſonæ regni qui de Rege tenent in Capite, habeant Poſſeſſiones ſuas de Rege, ſicut Baroniam, & inde reſpondeant Juſticiariis & Miniſtris Regis, & faciant omnes conſuetudines Regias: **Et ſicut ceteri Barones debeant intereſſe Judiciis curie Regis quouſque perveniatur ad diminutionem Pembrozum vel ad Poztem.**

After the Words, he gives us the Tranſlation of them, made by the Author of the Letter, in the following manner.

"The Arch-biſhops and Biſhops, and "all the dignified Clergy of the Land, "that hold of the King in *Capite*, ſhall "hold their Poſſeſſions of the King, as a "Barony, and anſwer for their Eſtates un- "to the King's Juſtices and Miniſters, and "ſhall obſerve and obey all the King's "Laws: and, together with the other Ba- "rons, they are to be preſent at all Judg-

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" ments in the King's Courts, till it comes " to require either loſs of Life or Member.

But, pray Sir, why did you not rather give us a Tranſlation of theſe Words of your own? If the Author of the Letter have made an imperfect Tranſlation, why did not you mend it? I believe, if this Author had found it would have advantaged his Cauſe, ſome Exceptions would have been taken to the Tranſlation. I ſhall by and by give the Reader a full account of the true Senſe of the whole Period; but will firſt make appear the Unreaſonableneſs of the Expoſition he makes of the laſt Clauſe of it.

Et ſicut cæteri Barones debent intereſſe judiciis Curiæ Regis quouſque *perveniatur ad diminutionem Membrorum, vel ad Mortem.*

The Meaning he conceives to be, That the Biſhops are required to be preſent in the King's Courts as other Barons are, till they come to give Sentence, as to diſmembring or loſs of Life. *Gr. q.p. 20.*

Why he tranſlates *Curiæ Regis* in the plural Number, the Kings Courts, which is in the ſingular the King's Court, and in this place, hath always been underſtood of the High Court of Parliament, in which, the other Barons had an Intereſt to be preſent as Judges, and in which Senſe, it is very often taken, as is made clear by Mr. *Petit*, in his learned Diſcourſe of *the ancient Rights of the Commons of* England. *Pref. pag.* 45. out of *Gervaſius Dorobornenſis. pag.* 1653. who ſpeaking of the *Petit.. pr. p.* 45. *Ger. Dorob. p.* 1653.

Election of Arch-biſhop *Lanfrank*, hath theſe Words; *Eligentibus eum Senioribus ejuſdem eccleſiæ cum Epiſcopis ac principibus* Clero & Populo *Angliæ in Curia Regis, in aſſumptione Sanctæ* Mariæ: and another Author ſaith, it was *Conſenſu & Conſilio omnium Baronum ſuorum, omniumque Epiſcoporum & Abbatum* totiuſque Populi Angliæ *commiſit ei Dorobornenſem eccleſiam.* That this was a Parliament, we have little Reaſon to doubt, and that it was called *Curia Regis.* See alſo *Inter com. T. Hill.* 17 E. 3. *Jenes remem. in Scacc.* 29. & 32 H. 3. 17 E. 3. *mem.* 12. 13. *in dorſ. rot. clauſ. Conſideratum fuit in Cur. noſtra & toto Parliamento noſtro,* &c. Wherein, *Cur. Regis, & totum Parl.* are but expreſſive of the ſame thing, and not two Courts, as I think: I very well know, that *Curia Regis* had various acceptations; ſometime it ſignified that Court of Juſtice that at thoſe times followed the King's Perſon; ſometime it was taken for *Aula Regis*, where Entertainments and Feaſts were made, as we read often in our Hiſtorians; but, I take it here to be underſtood of the High Court of Parliament, for the Reaſons before touched, and many others, if any ſhall ſeem to doubt of it.

Next, why doth he leave out *Judiciis*, whereas the Words are, The Biſhops, as the other Barons, ought to be preſent *Judiciis curiæ Regis*, in Trials in the King's Court, (*viz.* the Parliament) he renders they are to be preſent in the King's Courts.

Courts. To help himſelf under the covert of an ill Tranſlation, ſavours not of that candour juſtly to be expected from ſo learned a Perſon, and one that ſeeketh after Truth, rather than Victory: but, ſince this Author is a ſubtile and no looſe Writer, give me leave to gueſs at the Reaſon of it. He ſaw plainly, that had he fairly rendred the Words [The Biſhops as other Barons, have Right to be preſent in all Cauſes, Sentences, or Judgments in the King's Court, or Parliament, till the Cauſe, Sentence, or Judgment come to concern Life or Member; the Word *Judiciis*, in the plural Number, muſt have referred to other Judgments in other caſes, and then the latter clauſe [till Judgment, or Sentence came to concern Life or Member] would have been clearly reſtrictive as to caſes of Blood; for, to be preſent at the Judgments of the Court till Judgment, is Non-ſenſe, except the Words be applyed to different caſes. Now, this Interpretation would have quite deſtroyed his main Undertaking, who at laſt gives a Senſe of the Words, not only coincident with that given by the Author of *the Biſhops Rights*, to which I have before ſpoken, but contrary to the Votes of the Lords in Parliament; who, though they ſeem to admit their Preſence in the hearing ſuch a caſe, yet will not admit them to have any part or voice in the judging of it. Beſide, I muſt needs take notice,

that 'tis a ſtrange Tranſlation of the words, *Quouſque perveniatur*, or, *in judicio perveniatur ad diminutionem Membrorum vel ad mortem*. Till they come to give Sentence; when the Words more naturally import, till Judgment may be fulfilled in the cutting off of Member, or Life; which is Execution. But, I ſhall anon give him a more proper Tranſlation of the Words: in the mean time, will conſider all his Subterfuges and cunning Evaſions, by which he would give colour to his Interpretation.

Gr. 3. p. 20. Firſt, from the occaſion the Author of the Letter, *pag.* 73. had ſaid. The Prelates affected a kind of Omnipotency. (he conceives the Author means in Judicature) and I conceive he made that Suppoſition, becauſe he judged it for his Advantage to ſuppoſe ſo: not that the thing was true, or that the Author of the Letter gave him any cauſe to take up that Fancy. Their Affectation of Omnipotency was not to be freed from that part of the Law of the Land which was agreeable with the Laws of the Church, which they were content to ſubmit to; but their Deſire was, to be freed from thoſe they thought were againſt them, to wit, to do Service to the King, for their Lands, to anſwer to his Juſtices and Miniſters, to be ſubject to the ſecular Power for any crimes they ſhould commit. Theſe were the things they ſtormed at, and were the Eccleſiaſti-

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cal Bondage and the wicked Conſtitutions *Matt. Paris*, and other Hiſtorians of his Time ſo much exclaimed againſt, becauſe they would have had all their Affairs tranſacted in their own Courts; ſo that our Author need not have ſpent ten Pages, to prove what no body affirms. Much of the Conteſts between the King and Clergy aroſe from the Charter granted by K. *Stephen*, *Anno* 1136. That all Perſons and Cauſes eccleſiaſtical ſhould appertain only to eccleſiaſtical Judges; which Charter, whatever ſtir they made about it, according to our Author's Logick, was void: (for *Maud* the Empreſs, Daughter to *Henry* the Firſt, third Son to *William* the Firſt, and ſo right Heir to the Crown, was then alive, to whom the Biſhops and People had ſworn Obedience; and therefore King *Stephen* was as much an Uſurper as *Hen.* the Fourth.) This Charter was the *Lapis offendiculi*, the ſtumbling Stone they could not eſcape, and the meer reſtoring now at *Clarendon* the ancient Laws and Cuſtoms confirmed to the People by *Hen.* 1. was what gave them the greateſt Diſturbance; not that they affected any Omnipotency of Judicature, at leaſt in caſes of Blood: inſomuch, that our Author had no reaſon to pin a Senſe upon the Words of the Author of the Letter, to which, he had no Inducement from any Words of that Author.

Gr. q. p. 30. Having done with the Occaſion, we come now to his ſecond Enforcement of his Opinion, *viz.* the plain meaning of the Words. Firſt, he quarrels with the copy, the Author of the Letter follows, taken out of *Matt. Paris* and *Wendover*, who notwithſtanding, in Mr. *Selden*'s Opinion, have beſt preſerved the meaning of this Conſtitution. *Seld. tit. hon. part* 2. *pa.* 703. 704.

Seld. tit. hon. p. 703.

Though I do not grant his Vatican copy, following, as he ſaith, *Gerv. Dorobernienſis* is better, yet for once I am content to follow his copy, and admit the Words *in Judicio* to be inſerted, which are left out by *Matt. Paris*, yet I think neceſſarily implyed; but ſhall never yield to his unwarrantable conſtruction of them, which in concluſion amounts to this.

That the Biſhops were bound to be in the Kings Courts in all Judgments, till it came to Sentence of loſs of Life and Member, and then they might go out, in obe-

Gr. q. p. 32. dience to the Canons of the Church, if they pleaſed, to which they pretended themſelves bound in Conſcience to give Obedience; and that for this Reaſon, the Pope marked this Conſtitution with a *hoc tolerandum*, the others with *hoc improbandum*. I confeſs, I think the Interpretation of theſe Words contrary to their natural Senſe, and contrary to the Opinion and Practiſe of former times, who have always underſtood them to import, that the Cler-

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gy ought to be preſent in all Tryals in Parliament, except in Tryals of Blood.

But, before I proceed to make good the true Senſe and Tranſlation of theſe words, it will be neceſſary to explain the Signification of ſome of them. Firſt, *Quouſque uſque quo, dummodo, præterquam*, are often times indifferently taken, as ſignifying the ſame thing, and are limiting, reſtraining Particles, and uſed as Exceptions to ſomething which went before, ἕως ἄν till what time, till when, ſo far forth, except when, or the like.

Secondly, *Judicium* ſignifies properly a Tryal at Law, a Caſe, a Suit, or Proceſs, and is not taken for a definitive Sentence, except when it is delivered as the Opinion of the Court, reſulting upon a precedent Tryal had before others; in which, he that pronounces Sentence hath not, or very rarely, more than a directive Power, and do's not give his own ſingle Opinion but the Senſe of others, in matters debated. *Actiones quarum cauſa in jus quiſque vocatur quandoque dicuntur judicia.* Ut in L. in bonfid. 13. de Uſuris L. 4. C. tit. 32. L. Mora S. in bo. fid. Theophilus refert in S. 1. de Act. quas Athenienſes Δίκας dicebant & *Budæus* notat. in communi Lingua Græca per Δίκην generali nomine dicebant litem, actionem, pœnam, mulctam & judicium, to wit, the whole Proceedings. *Judicium eſt legitima diſceptatio duorum, aut plurium coram judice* Cale. Dict. Calv. *Lex. jurid.*

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circa finem. to the ſame purpoſe. By theſe Authorities and many more, 'tis plain, that *Judicium*, Judgment, comprehends the whole Proceedings in any Cauſe, and not the Sentence only.

Pervenio ſignifies to arrive at, or the Accompliſhment, or Bounds of any thing; as *pervenire ad metam* is to arrive at, or come to the Goal. *Ovid* ſpeaking of the Return made by the Eccho, hath theſe Words, *Verba refert aures non pervenientia noſtras*, Words that arrived not at our Ears, they came not to the Terms or Bounds deſigned. So *pervenior*, in the Paſſive Voice, muſt ſignifie to be arrived at, or accompliſhed in.

That *Judicium* in our Caſe muſt be taken in the Senſe I have given, I ſhall evince from the general Opinion of Lawyers. I ſhall begin with *Magna Charta*: The Words there are *judicium Parium*, and underſtood of a Tryal by his Equals. The Queſtion which is asked the Priſoners after their Plea, is, not who ſhall give Sentence upon thee? but how wilt thou be tryed? and they that give Sentence are not thoſe that try them in criminal Caſes: nay, their appealing to a Tryal by them, is accounted a ſtanding Mute. The next Authority ſhall be from the Council at *Weſtminſter*, in the 22. year of *Hen.* 2. no more than twelve years after the Aſſize of *Clarendon*, and as *Hoveden* ſaith, taken out of the 11. of *Toledo*, and ſummoned as *Gervas* of *Canterbury*

Hoveden f. 543. *Ger. Dorob. fo.* 1429. *An.* 1175.

terbury ſaith; *In hoc conſilio ad emendationem Eccleſiæ Anglicanæ, ex aſſenſu Domini Regis & primorum omnium Regni hæc ſubſcripta promulgata ſunt Capitula.* Amongſt which, this is one.

His qui in ſacris ordinibus conſtituti ſunt **judicium ſanguinis agitare non licet**: *unde prohibemus ne aut per ſe Membrorum truncationes faciant, aut inferendas judicent.* That ſuch as were in holy Orders ſhould not agitate or meddle in Tryals of Blood as a thing unlawful: for which Reaſon, they are prohibited from cutting off any Member themſelves, or from giving their Opinions or Judgments that ſuch Puniſhments ought to be inflicted. This Synod we ſee was not only a Meeting of the Clergy, but with them of the *Primores Regni*, and the Determinations promulgated by their Aſſent and the Aſſent of the King: for the Lay-men did uſually meet with the Clergy in their Councils, in thoſe days. To which purpoſe, ſee a Tractate of a late learned Writer, in his *Jani Angl. fac. nov. pag.* 213. which came not to my hand till very lately. Now, whether this Agitation of the Clergy, in matters of Blood, had reference to the ordinary Courts of Juſtice, in which they might not be preſent, or to all in general, is not material, ſince it is only produced to ſhew the meaning

Non licet ought not to be tranſlated, it is not convenient as Mr. *Hunt* would have it, and never hath that Signification but when a Law intervenes, which makes it as well unlawful as inconvenient; for, every Law makes the Breach of it inconvenient.

ing of the Word; and certainly, if it be incluſive as to thoſe Courts, it is not excluſive to any other. And Agitation in Tryals being naturally before Sentence, Agitation in Tryals muſt extend to Preliminaries.

Let us now come to the Conſtitutions of Arch-biſhop *Langton* in *Linwood*. 'Tis firſt found, *lib.* 3. *tit.* 29.

Linw. lib. 3. tit. 29. Ne qui Cler.

Ne Clerici vel Mon. fo. 269. ult. edit. *Præſenti ſtatuimus decreto*, &c. " Nec Juriſdictiones exerceant ſæculares, præſertim illas quibus judicium ſanguinis eſt annexum. His quoque duximus adjungendum, ne ſcilicet judicium ſanguinis in locis ſacris tractetur, in eccleſia videlicet, vel in cæmeterio. Authoritate quoque Concilii diſtrictius inhibemus ne quis Clericus beneficiatus, vel in ſacris ordinibus conſtitutus literas pro pœna ſanguinis infligenda ſcribere, vel dictare præſumat, vel **ubi judicium ſanguinis tractatur, vel exercetur interſit.** The Sum of all which is, that no Clergy-man ſhould exerciſe Juriſdiction in any cauſe to which Sentence of Blood was annexed. That no cauſes concerning Blood ſhould be held in Churches or Church-yards: Laſtly, that they ſhould not be intereſſed where cauſes of Blood were handled, nor ſhould preſume to write, or dictate ſuch Sentences to be inflicted. " To the ſame purpoſe are the Conſtit. of *Otthobon.* " Ne cler. advocat. tit. 7. p. 91. Let him look

" look upon his own Authority out of *Hoſtienſis*, *Proteſtatio in judicio* is meant of a Proteſtation in a Suit, or Proceſs. I am ſure theſe are Teſtimonies more than enough, to ſhew the true meaning of *judicium* among Lawyers, which is the only end for which I have produced them.

I ſhall now come to the true Tranſlation of the Words, but ſhall not follow Mr. *Selden*; and after him, the Author of the Letter, in rendring *Univerſæ perſonæ Regni*, all the dignified Clergy: nor ſhall I allow of his Criticiſm of *Perſona* or *Perſonatus*, becauſe, for ought appears to me, ſome Clergy-men, who were not dignified might, by Licenſe from the King, purchaſe Lands held in *Capite ſicut Baroniam*, and thereupon, think themſelves exempt from this Law. *Vid.* Treat. of the Nobil. pag. 68. ſuppoſed to be by *Doddridg.*

Having thus far cleared the way, I come now to the true Tranſlation of the Words themſelves, which are,

" Archiepiſcopi Epiſcopi, & Univerſæ " Perſonæ Regni, qui de Rege tenent in " Capite habeant poſſeſſiones ſuas de Rege " ſicut Baroniam, & inde reſpondeant Ju- " ſticiariis, & Miniſtris Regis, & faciant " omnes conſuetudines regias. **Et ſicut ceteri Barones debent intereſſe Judiciis Curie Regis, quouſque perveniatur [in Judicio] ad diminutionem Pembrozum vel ad Mortem.**

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In Engliſh.

'Let the Arch-biſhops and Biſhops, and 'all Perſons whatſoever of the Kingdom, 'who hold of the King in *Capite*, have 'their Poſſeſſions from the King in the Na-'ture of a Barony; and by reaſon thereof, 'let them anſwer the King's Juſtices and 'Miniſters, and perform all Royal Cuſtoms. 'And in like manner, as the reſt of the Ba-'rons 'tis their Duty to be preſent at all 'Debates, Proceſs, or Proceedings in the 'King's Court (*viz.* the Parliament) till what 'time, ſo far forth, or except when in the 'Tryal, Debate, or Proceſs, the loſs of Life 'or Member may fall out to be the Upſhot 'or Concluſion of the Caſe, or the matter 'put in Iſſue.

In plain Engliſh, in all caſes where the Iſſue or Concluſion may fall out to be ended in loſs of Life, or Member, they are by this Law to be abſent. Now I hope upon Iſſue joyn'd, if the Impeachment be of a capital Crime, the concluſion or upſhot may happen to be found to concern Life or Member. And that this is the true Senſe and Conſtruction of the Words, I dare appeal to any Man, who is ſo far Maſter of the Language, as not to think fit to confound Moods, Tenſes, and Numbers, at Pleaſure, as this Author ſeems to do, when he reads *Curiæ Regis* the King's Courts, which being in the ſingular Number, refers only to the King's great Court, the Parliament, *the King's Courts in the pla-*

plural. Perveniatur in the Potential Mood, when ſuch a thing may be brought to paſs, with *pervenitur* in the Indicative Mood, when ſuch a thing is brought to paſs, that is, as he erroneouſly tranſlates, till Sentence comes to be given. And the Authorities before-cited evidently ſhew, that the Writers of thoſe Ages underſtood the Law in that ſenſe. To which Authorities, I ſhall now add the Opinions of Mr. *Selden*, Sir *Edward Cook*, Mr. *Hakewell*, and *Fitz-Stephens*, a Writer of good eſteem with our Author. Mr. *Selden*, *Tit. Hon.* part. 2. ch. 5. p. 704. explaining theſe Conſtitutions of *Clarendon*, ſaith, that the meaning of this in queſtion is, That the Biſhops were to ſit in Judgment with the reſt of the Barons in all caſes, ſave in caſes of Blood. Now, I hope, every man will admit 'tis a caſe of Blood before Sentence, and that the Barons ſit in Judgment when the Matter comes to be treated of before them. Sir *Edward Coke*, *cap. de Aſportatis Relig.* cites the Parliament of 11 *R.* 2. where, by their own acknowledgment, they went out before any Debate; their preſence being prohibited by the Canon-Law. Mr. *Hakewel*, in his *Mod. ten. pag.* 84. hath theſe words; "Therefore we ſee the Preſence of the Biſhops in Parliament, in reſpect of their "Baronies, is, **Quouſque perveniatur ad "diminutionem**, &c. for ſo, even unto our "times, when Queſtion is had of the Attainder of any Peer, or other, in Parliament

Seld. tit. hon. p. 704.

Cook 2 Inſt. pag. 587.

Hakewell mod. pa. 84.

" ment, the Arch-Biſhops and Biſhops de-
" part the Houſe, and make their Proctors.
Here you ſee they are to depart when Queſtion is had, &c. As to their making Proctors I ſhall ſpeak more fully hereafter, as alſo ſhall ſhew, that the Canon Law both by theſe Conſtitutions and before them, was part of the *Conſuetudines Regni*: yet this, by the way, appears plainly, that the deſire of the Commons in 21 *R.* 2. that they might make Proctors, muſt have reference to the beginning, not the end of the Tryal, when the naming them was uſeleſs. But let me not do him wrong; for, *pag.* 33. he touches the Senſe I have given, but diſlikes it; *viz.* That the laſt Clauſe is not to be underſtood of the Sentence, but of the kind and quality of the Cauſe: that is, they are to be preſent in the King's Courts, till they come to a Cauſe where Life and Member are concerned. This Senſe certainly is near the Truth, but that he confounds the Potential with the Indicative Mood. The Words are, where Life or Member may be concerned, which he reads, are concerned, and ſo ſeems to refer them to the Sentence which ought to be referred to the whole Proceedings. In the laſt place, let us hear the Senſe his grave Author *Fitz-Stephens* puts upon this laſt Clauſe. After the Appeal of the Archbiſhop *Becket* to *Rome*, the King expoſtulates the matter with him; asketh him why he would break his Oath, ſo lately

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ſworn at *Clarendon?* Amongſt which, **Hec una eſt ut Epiſcopi omnibus ejus aſſint judiciis preterquam judicio ſanguinis.** That is, That the Biſhops ſhould be preſent at all Tryals, except when the Tryal concerned Blood; where you ſee, he renders **Quouſque** by **preterquam** as indeed *uſque quo, quouſque, uſque dum, preterquam*, have the ſame Senſe all reſtrictive. Now *Fitz-Stephen* was undoubtedly at the Parliament at *Clarendon*, which was not above ſeven months before the Meeting at *Northampton*. *Fitz. ca.* 10. *col.* 12. *Adſint.* *Fitz. caſ.* 10. *col.* 12.

Our Author proceeds, and tells you, there is a great deal of difference between **Quouſque perveniatur ad judicium mutilationis Membrorum vel Mortis,** and **quouſque perveniatur in judicio,** &c. I confeſs, I underſtand not this Criticiſm, which however is not warranted by the Authority of any Copy; neither can it be made capable of any good Senſe, except one not different to what I have given; for if it were **quouſque perveniatur ad judicium,** &c. I ask to what doth *perveniatur* refer? I think moſt properly to *Curia Regis*. That is to ſay, 'tis their Duty to be preſent at all Proceedings in Parliament, until ſuch a Caſe may fall out where Life or Member may be concerned. For, we muſt not be permitted to fancy a Senſe of Words, and then, contrary to all Rule, wreſt them to our own Biaſs, and againſt the Opinion of ſuch as writ before us: neither are we

to expect from these old *Monkish* Writers, such polite Latin as *Tully* writ, but take their meaning as others who liv'd nearer the time have done before us. So that I have done with this Clause, when I have first told the Reader, that I have translated *debent interesse*. 'Tis their Duty to be present, because they would often take Liberty to go away, or protest, or be troublesom upon several Pretences: sometime the Canons allowed them not when the Law did; sometime the Liberty of the Church was concerned, as appears by the Statute *de asportatis religiosorum*, where they absented themselves. *Co. 2. Inst. pag.* 585.

Co. Ma. Ch. P. 585. All these Subterfuges were obviated by this Statute, (although perhaps not by them well observed) which required their Attendance in Parliament in all Causes where they were not prohibited by the received Laws of the Nation. Now our Author acknowledgeth, that the Council of *Toledo* was brought into *England* by *Lanfrank*, in *William* the First his time; which Council, is put out in the second Tome of the *English* Councils, by Sir *Will. Dugdale* and Mr. *Spelman*, as the Work of Sir *Henry* his Father. That Council forbids their Presence in *Cases of Blood*, which being, as he admits, received here as low as the Conquest, made it a Custom in *Henry* the First his Time, and an ancient Custom in *Hen.* the Second, and now being allowed

as

at the Parliament at *Clarendon*, to which they all ſwore, makes that Cuſtom or Canon as much a part of the Law of *England*, as any affirmative Statute can, and ſo not to be repealed, except by as equal Authority as that by which it firſt became a Law, and was now affirmed as ſuch.

By what hath been hitherto ſaid, I think it will appear competently plain to any unbiaſſed Reader, that the word [**in judicio**] doth not refer, as he ſuppoſes, to that particular Tryal then in Court, as if it had reſpect to one Period in the Tryal, and left them at liberty to be preſent at all other parts of it; but was reſtrictive to all Tryals whatſoever which might have their Concluſion in Blood: and his Alluſion in the ſame Page is as little ſolid. As ſuppoſe, ſaith he, *Charles* the Fifth had required the Proteſtant Princes to attend him to Maſs, as other Princes did, only when the Maſs-Bell tinckled they might withdraw; would not any reaſonable man believe by this that they were obliged to their Attendance till then: So here the King commands their Attendance till it comes to ſuch a Point; therefore before it comes to ſuch a point, their Preſence is plainly required by this Conſtitution. This Alluſion or Suppoſition doth no way anſwer our Caſe; except he had ſhewed us that there were different ſorts of Maſſes, in ſome whereof, the tinckling-Bell ſounded, in others not: and then *Gr. q. f.* 33.

Charles the Fifth had required their Attendance at all Masses, until such a Mass might fall out in which the tinckling-Bell was to sound; here their Absence would have been allowed during every part of such a Mass. Our Case is the same; some Tryals there are in Parliament which may concern Life or Member, others which cannot. Now the Statute saith, 'tis their Duty to be present in all Tryals, until such a Tryal happen in which Life or Member may be concerned. I hope here this Restriction will have Reference to the whole Tryal, and not any particular Period of it. I had not said this, the matter being sufficienttly cleared before, but out of Apprehension, that some unwary Reader might be misled by this Author's Subtilty, and believe there was weight where indeed there was none.

Gr. q. p. 34.

That Edition in *quarto anno* 1600. is certainly the best, the latter ones being printed from that Copy.

Pet. Blesen. Y y 2.

But however, the Words of *Petrus Blesensis* will give great light to the whole matter. This *Petrus Blesensis* was Arch-Deacon of *Bath*, and the place cited is amongst his *Opuscula*, in the Edition I have in *Quarto*, and precedent to that other in *Folio*. 'Tis in his Tractate *de institutione Episcopali. pag.* 542. (or rather, Y y 2 for the Pages are in my Copy falsly numbred) dedicated to the then Bishop of *Worcester*. The Design of the whole Tractate is to shew the duty of a Bishop, and by the whole Scope seems to be addressed to all Bishops, and not to the *English* only. He lived in the time

time of *Hen.* 2. for his 136. Epiſtle is to Pope *Alexander* the Third, from K. *Henry*, about the Rebellion of his Son.

The Words are not in my Edition, as the Author recites them, *Principes Sacerdotum & Seniores Populi.* But *Quidam Principes Sacerdotum, & Seniores Populi.* Not the chief Prieſt and Elders, but certain of the Chief Prieſts and Elders of the People. By which, it ſeems to me, this could not be underſtood of an *Engliſh* Parliament, becauſe all the Biſhops had equal right to be preſent in Parliament, and this is reſtrained to certain of them. Secondly, I think *Seniores Populi* never comprehends Abbots, Priors, with Lords and Commons together: I know *Baronagium, Clerus, & Populus*, are ſometime ſo taken; but I believe *Seniores populi* never comprehends them all: ſo that our Queſtion being concerning their Rights in Parliament, if this be not meant of one, it will neither advantage nor prejudice me, but only ſhew how willing they were to break

The critically learned Mr. *Hunt*, in his undigeſted Lump, inſtead of a methodical Diſcourſe, *pag.* 59. endeavours to cure the Ignorance of his Readers, by telling them, that by *Principes Sacerdotum & Seniores Populi*, the Biſhops are only meant; who from the Dignity and Worthineſs of their Order, are called *Seniores*, a note of Dignity, in all Countries. He ſhould have done well to have added *Quidam Principes Sacerdotum, & Seniores populi*, as the firſt and beſt Edition of *Petrus Blaſenſis* hath it. That *Senior* is a name of Honour, he might have learn'd at School: but that the Chief Prieſts and the Elders often mentioned in Scripture were the ſame Perſons, he hath taught no body nor learnt himſelf; and certainly the Addition of *Populus* will do him little Service. But this Author would be an excellent Man, were he as good at proving as propounding.

break through all Rubs when they could, in those times of their Power, and the Blindness of the People. The whole Sentence by our Author abridged to his purpose, is as followeth.

Vide before p. 18. and after p. 129.

Illud cœlestem exasperat iram, & plerisque discrimen æternæ damnationis accumulat quod quidam principes sacerdotum, & seniores populi, licet non dicant **judicia sanguinis**, *eadem tamen tractant disputando, & disceptando de illo, seque ideo immunes à culpa reputant, quod mortis & truncationis Membrorum decernentes, à pronunciatione duntaxat, & executione panalis sententiæ se absentent. Sed quid hac simulatione perniciosius est? Nunquid definire, & discutere licitum est quod pronunciare non licet.*

Mortes & truncationes melius ut videtur.

In English.

This doth exasperate the Wrath of Heaven, that certain of the Chief Priests (or Bishops) and Elders of the People, notwithstanding they do not dictate, or pronounce Judgments of Death, yet they handle them in their Disputations, and discussions of the same; yet notwithstanding think themselves free from Guilt, because, though they Decree the Sentence of Death, or loss of Members, they only absent themselves at the pronunciation of the Penal Sentence. But what is more pernicious than this Simulation? Is it lawful to discuss and determine what is unlawful to pronounce? And in the whole Treatise inveighs against the general neglect of the

Bishops

Biſhops in performing their Duty, not confining himſelf to any place, and ſeems a prophetical deſcription of the practiſe of the Inquiſition, afterward brought in by S. *Dominick*.

But if it were referred to the practiſe of ſome of the Biſhops and Clergy of *England*, probably it may be meant of ſuch as were made Secular Judges, or ſate with the Earls in the County Court, where they perhaps were preſent at the diſcuſſion, though not at the Sentence, which was left to be pronounced by the Secular Judge, till after the time of *Edw.* 1. See 28 *Edw.* 1. c. 3. where it is ordained, that the Juſtices appointed to take Aſſizes, in every County where they do take as they be appointed Aſſizes, ſhall remain together, if they be Lay-men; but if one of them be a Clerk, then one of the moſt diſcreet Knights of the Shire, being Aſſociate to him that is a Lay-man, by our Writ ſhall deliver the Goals of our Shires. Here we ſee their Power, though Juſtices, to meddle in Capital Caſes was prohibited; nay ſome Records are in the Tower, that when two have been commiſſioned as Judges for the ſame Circuit, the Commiſſion of the Clerk has been reſtrained to common Pleas; that to the Lay-man unlimited, ſee *Jani Ang. facies nova. pag.* 209. 210. Shall we now believe, that what was prohibited to Clerks in *Edward* the Firſt his Time, was permitted to them in the High Court of Parliament in ſubſequent times? I

Jan. Angl. fa. nov. pag. 209. 210.

I have given my Reasons why I think *Seniores Populi* could not comprehend the Abbots, Priors, Lords, and Commons; yet if any man will contend this was a Parliament, then must *Seniores Populi* comprehend, amongst others, the Commons and their Proceedings to be in a legislative way, in which the Commons could only meddle, and in which, we deny not the Clergy to have their part; so that this doubtful Precedent will no way serve our Author's Turn.

His second Instance to make good his Assertion, is taken from the Authority of *Will. Fitz-Stephen*, a Monk of *Canterbury*, in MSS. in Sir *Rob. Cotton*'s Library, and some other private hands, in which he relates what happened to Arch-bishop *Becket*, in the Contest between the King and him in the great Council at *Northampton*, called soon after, *Becket*'s obstinate Carriage at *Clarendon*: in which Relation, among others, that Author hath these Words. *Secunda die confidentibus Episcopis comitibus Baronibus Angliæ omnibus Nor. pluribus Roffensis Episcopus, & quidam alius nondum venerat. Archiep. lesæ majestatis co-*

N. B. Nothing urged by *Mr. Hart*, *p.* 62. does prove that Meeting a Parliament, but such a Council as was free for the King to call, of such Persons as he pleased. I am sure here are neither Abbots nor Commons summoned. I presume this Author never read *Fitz-Stephens*, whose words are *confidentibus*, not *consulentibus Episcopis*. We have seen such a *Concilium magnum* at *York*, called by King *Charles* the First.

rona

rona regia Arguitur; *quia (ſe) ut ſupra narratum eſt à rege citatus ro cauſa* Johannis (to wit, *John* the Marſhal) *neque venerat neque idonee ſe excuſaſſet. Archiepiſcopi depoſitio nullum locum habuit. Allegata tamen* Johannis *ſuprædicti injuria, & juriſdictione hujus cauſæ propria, & curiæ ſuæ integritate; Rex exigit judicium. Archiepiſcopi nulla ratio eſt approbata.* Then after much debate who ſhould do it, Judgment was pronounced by the Biſhop of *Wincheſter*, which ended in the Confiſcation of all his perſonal Eſtate. The Sum of what *Fitz-Stephen* ſaith (which is *cap.* 10. *col.* 2. *p.* 21. in that Copy I have ſeen) is this, That when the Biſhops and Barons of *England* and many of *Nor. Normandy* (as Mr. *Selden* thinks) were met together, the Arch-biſhop is there accuſed of Treaſon, becauſe having been cited by the King in the Cauſe of one *John*, he appeared not, nor gave in a ſufficient Excuſe.

Arguitur I conceive doth more properly ſignifie to induce or argue a thing to be ſo, as well as to blame or accuſe, and is more properly applyed to Arguments or Diſceptations.

Fitz. cap. 10. *col.* 2.

To let paſs what is materially replyed by the Author of the Letter, to this Authority, I ſhall make ſome Obſervations of my own, not yet taken Notice of. Firſt, That this Aſſembly held at *Northampton* was not a Parliament, but a great Counſel ſummoned by the King ſoon after *Becket*'s ſtubborn carriage to his Prince at *Clarendon*, to be adviſed by them how to humble that proud Man; where it was law-

lawful for him to uſe the Counſel of any of his Subjects, of *Normandy* or others, as he thought good; who certainly, in an *Engliſh* Parliament could not be admitted amongſt the natural *Engliſh*. Secondly we hear nothing of the reſt of the Clergy nor the commons but of the Biſhops, Earls and Barons; but that the Commons had allways right to appear in Parliament, is learnedly made good by Mr. *Petit* in his Tractate of the ancient Rights of the Commons. In the next place, the relation of *Fitz-Stephens* is not only different from the relation of other Hiſtorians, but in it ſelf is ſubject to many Exceptions: For firſt it is plain he was not accuſed of High Treaſon in the caſe of *John* the Marſhal, as he ſaith, which appears, by the Judgment of that Council, which upon the whole matter reac'hd only a Confiſcation of his perſonal Eſtate, which ſhews clearly the Accuſation was not in that Caſe for Treaſon, becauſe they here puniſhed him with a leſſer Puniſhment than was due to Treaſon: now 'twas not in their Power to change the nature of the Crime, but muſt have either found him guilty of Treaſon, or have acquitted him. But the Truth is, there was a ſecond Accuſation by the King, about the ſame time, and in the ſame Place, concerning Accounts to the King

N. B. In thoſe times, Treaſon in common Speech was a general name for all Offences the King thought did *ledere Majeſtatem regiam*, till afterward the matter was better explained in 25 *E.* 3. Vid. *Jani Anglor. facies nova*, p. 199.

King of Receits, during the Vacancy of the Sees of ſome Biſhopricks, when he was Chancellor, to which he refuſed to give other Anſwer, ſaying, He was not cited in that Cauſe, and over and above, that he was fully diſcharged of all Accounts whatſoever when he was made Arch-biſhop: but the Heats and Animoſities occaſioned hercupon, made him appeal to *Rome*; which being ſo immediately after, and contrary to his Oath at *Clarendon*, might be called by the Name of Treaſon in thoſe Days: yet it appears plainly, that an Appeal to *Rome* was not in thoſe times look'd upon as a Capital Crime. To this Purpoſe, ſee *Spelman's* Councils. *Tom.* 2. *fol.* 119. Concilium Pan-Britan. apud Pipewell, *Congregatis illic Archiepiſcopis Britanniæ quibuſdam. Norman. Galliæ & Hiberniæ Epiſcopis Abat.* &c. *infra nominat. præſente etiam ipſo* Ricardo *Rege*, An. Dom. 1189. & 1 *Ric.* 1.

The King having given the Arch-biſhoprick of *York*, *Gaufrido fratri ſuo quondam Lincolniæ electo*. The Arch. of *Canterb. Calumniatus eſt conſecrationem illius, & prohibuit ei ne ipſe ab alio quam ab eo conſecrationem ſeu ſacerdotalem ordinem ſuſciperet. Super hoc appellant ad Dom. Papam. coram Rege & univerſis Epiſcopis, & Clero & Populo chartam Willielmi Regis Baſtardi in qua continebatur controverſia quæ olim vertebatur inter Cantuarienſem & Eboracenſem eccleſias protulit.* Here you ſee an Appeal

to

to *Rome*, publickly made, and the Appellant not queſtioned for Treaſon or any other Miſdemeanour; and this done in 1 *Rich.* 1. who was the Son of *Hen.* 2. But admit this Appeal, or rather Perjury, in that time had been a Capital Crime, his Appeal here hindred the pronouncing any Judgment: So that *Fitz-Stephen* is miſtaken in the firſt Point; for he was neither accuſed nor condemned of Treaſon in the cauſe of *John* the Marſhal. Secondly, he tells you he was accuſed of Treaſon, becauſe being cited, he did neither appear, nor competently excuſe himſelf, which muſt be underſtood to be meant by ſome other Proctor or Advocate; for, if he did not appear, 'tis impoſſible he ſhould excuſe himſelf any other way: for it is clear he was at *Northampton*, *Ipſa die venimus Northamptoniam*, ſaith *Fitz-Stephen*, *cap.* 10. *co.* 1. That the Court ſate not till the ſecond day after their coming, and he made an Appearance on the third, is confeſſed by the ſame Author, who a little before tells you, he ſent *quatuor Milites* to give his Anſwer, and the King's Exception was, that he did not anſwer in his proper Perſon, which certainly by Law he was not obliged to do, ſo that here was but a Contempt of one day; however, they were reſolved to proceed for the Arch-biſhops *Depulſio*, or anſwer for himſelf, took not place; for ſo I take the mean-

Fitz. cap. 10. *co.* 1.

These *Milites* I conceive might be ſuch as held *in Capite*, and were ſometime called Baronets or *Barones minores*.

meaning of *depulſio* to be. *Archiepiſcopi ratio nulla eſt habita.* Whether you take *ratio* for an Account, which probably he might give as to 300 *l.* pretended to be due to *John* the Marſhal, or in any other Senſe, 'twas not allowed. Laſtly, you have theſe words, *Archiepiſcopus autem quia ſententiæ, vel recordationi* **Curia Regis** *non licet contradicere ſuſtinuit, conſilio Epiſcoporum, ad Acta, ad mitigandum, & honorandum Regem, ſolenni, & manuum ipſius miſſione quaſi conceſſionis Judicii ut moris eſt ibi.* The Archbiſhop, by the Counſel of the other Biſhops, becauſe he might not contradict the Sentence, and memorial of the Kings court, ſubmitted to their Acts; to the end that by his Submiſſion he might Honour the King, and mitigate his Anger; and yielded to the Judgment, and put in for his Sureties, all the Biſhops, except *London*, of which, notice was taken. Can any thing now be clearer than this, that he both appeared, ſubmitted to the Judgment, and put in Sureties to perform it, and that here could not be any formal accuſation of Treaſon, whatſoever the Counſellors might diſpute among themſelvs. So that *Fitz-Stephen*'s Relation, as to this matter, is not only contrary to the Judgment of the Court, which condemned him not for Treaſon, and contradictory to himſelf, who making the Relation as an Hiſtorian of what was done in that caſe where himſelf was preſent, muſt be ſuppoſed to write what in truth was the matter of Fact,

Curia Regis was here the Kings Council then ſummoned.

Manuum depreſſio, I take to be Submiſſion.

Fact, and not what was the Opinion or Diſcourſe of others; except he had told us ſo. But this proud Prelate being, as the King thought, not ſufficiently humbled by the Judgment aforeſaid, nor by many other Affronts put upon him by the King's Officers, a new Crime, as I touched before, is found out againſt him, for Accounts, to the value of 3000 Marks, to which he is
Gr. q.p.39. required to anſwer, and to which, ſaith our Queſtioniſt, he gave a dilatory Anſwer; ſo that the King requires him to ſtand to the Judgment of the Court: But the Anſwer he gave was this, That the King knew well enough, that before his Election to the See of *Canterbury*, he was diſcharged; and how the Prince, the Barons of the Exchequer, and Sir *Robert Lucy*, Chief Juſtice, gave him a Diſcharge for all Accounts and ſecular Receipts from the King, and ſo free and clear, was choſen to the See, and would plead the ſame no more. Was this now a dilatory Anſwer, and not a clear Diſcharge? What doth any Accountant in the Exchequer do more? Neither could the Court expect, being cited upon another Buſineſs, he ſhould bring his Diſcharge in his Pocket. But what if this Accuſation had been true? Was this Treaſon? If every Cheater had been a Traytor, the King would have had enow to hang? But this Storm went higher, for *Becket* finding himſelf over-power'd by the King's Party, and mena-

menacing Words from them, comes in his Archiepiſcopal Robes, with a Croſs in his hand, and appeals to *Rome*; for which, he was blamed and ſharply rebuked by his old Enemy the Arch-biſhop of *York*; and as *Hoveden* ſaith, by *London* and others. But, by his Appeal he avoided all Sentences could be pronounced againſt him, yet left his Enemies and the King much incenſed againſt him. *Gervaſe* of *Canterbury* tells you, *col.* 1392. that the King ſitting upon his Throne, it ſeems in a hurry, for the Words are *eunte diſcernite*, ſaid, going forth, Conſider what this perjured and contumacious Traytor ought to ſuffer *Iter, judicatur.* They went out and gave their Opinion, for this could be no legal Judgment, becauſe firſt it was out of the place where the Council ſate, and his Appeal prevented all farther Proceedings, as it was then held. This is the Sum of the Story, taken out of *Daniel's* Hiſtory upon the Year 1164. as he ſaith, particularly delivered according to the Writers of thoſe Times: who thoſe were he tells you in his Preface; *Hoveden, Giraldus Cambrenſis, Mat. Paris, Mat. Weſtm. Riſhanger*, and others. By this Relation you may ſee the Credit of this grave MSS. Author, who hath knit together ſo many Miſtakes, and different from the Relation of others, of, or near the ſame time. But the Biſhop is now gone, though before his going the King expoſtulates the matter with him; to whom he anſwered,

That he was ſummoned in the Cauſe of *John*, the Marſhal, and would anſwer to no other, having then made his Appeal. Neither, to ſpeak my Mind freely, can I ſee how he could be accuſed of Treaſon; for, Who was the Accuſer? The King could not, becauſe by reaſon of the dignity of his Perſon no Averment could be made againſt him; neither could any man be tryed but by his Peers. Now we hear of no Articles exhibited, no Jury ſummoned, nor no legal Proceedings in caſe it had been a Parliament: for, though *Mag. Charta* was not ſo perfect as in *Henry* the Third's Time, yet all Hiſtorians agree 'twas granted in *Henry* the Firſt's Time; of the chief Points whereof, *Stephen Langton*, Arch-biſhop of *Canterbury*, brought a Copy into the Parliament in King *John*'s Time (a worthy Prelate he was, though an *Italian*) though it were the Law of the Land before; and though the Council of the King might, in ſome Miſdemeanours, proceed arbitrarily, yet in Treaſon they could not, as is well obſerved by Mr. *Selden*, *Priv. of Bar. ca.* 4. *pa.* 10. but they were in thoſe Caſes to be tryed by their Equals. *Co.* 2. *Inſt. pag.* 50. tells you, 'twas as ancient as *William* the Firſt, gives you an Example of *Roger*, Earl of *Hereford*, ſo tryed in his Time. But we have not yet done with *Fitz-Stephens*; for, our Author tells you, that the King, upon the proud Anſwer

Mat. Paris Ann 1213. *pa.* 240.

Seld. Pr. Bar. cap. 4. *pag.* 10.

Gr. q. p. 40.

Anſwer of *Becket*, charges the Biſhops, that together with the Barons, by virtue of their Allegiance, they would give Judgment upon the Arch-biſhop. They excuſe themſelves. The King preſſeth them. *Fitz-Steph.* Words are, *Rex reſponſo Archiep. accepto inſtat Epiſcopis præcipiens, & obteſtans per homagium, & fidelitatem ſibi debitam & juratam ut ſimul cum Baronibus de Archiepiſcopo ſibi dicent ſententiam*, &c. This he tranſlates, That the Biſhops, together with the Barons, would give Judgment upon the Arch-biſhop. This appears to be after his Appeal, when the giving of Judgment, or medling farther in the Buſineſs, was refuſed: beſide the undue Tranſlation of the Words, which ſignifie no more but the deſire of the King that they would tell him their Opinion touching the Arch-biſhop, I wiſh he would give me any good Authority where *dicere Regi ſententiam* (for *ſibi* here is the ſame) can ſignifie giving Judgment upon a Criminal, as he tranſlates them. I know very well, that *dicere judicium* may be taken to deliver any Sentence leiſurely. *Linw. lib.* 3. *Ne Cler. vel Mon.* where it is all one with *dicere* or *ſuggerere ſententiam*. Beſide, no ſuch Senſe can be affixed to theſe Words; for, the King's Queſtion refers to them all in general, but certainly the King did not mean they ſhould all pronounce Sentence, but only privately tell him their Thoughts: yet from hence

would our Author infer, that this was a Parliament, and that the Biſhops had Power to give Judgment in Criminal Caſes, when he hath proved neither; becauſe in Truth, this was only an Attempt of the King's to draw them to his Party, having then Intentions to ſend to *Rome* about this matter. The Words of the Biſhop of *Chicheſter*, which he ſpake to *Becket* after his Appeal to *Rome*, will do him as little Service; for they import no more, than that the Interdict laid upon him and the reſt from doing any thing againſt him during his Abſence, hindred them from being preſent at ſuch Proceedings againſt him as the King required from them. 'Tis not to be doubted, but the King would have preſſed them to deliver their Opinions, whither his Appeal were Treaſon or not: what their Judgment would have been, no man knows. If it had been a Parliament, then ſummons muſt have been ſent out for his Appearance, and Proceedings by Bill of Attainder, in a Legiſlative way, not arbitrary in Caſes Capital. *Seld. pri. Bar. cap.* 4. *tag.* 10. as before noted. He cloſes this Head of Diſcourſe with a pretended Confutation of the Author of the Tractate of Peerage, a Book by ſome ſnarl'd at, but by none anſwered: but let us examine what they both ſay. The Author of the Diſcourſe of Peerage, tells you, *pag.* 14. and backs what

what he ſaith, by the Authority of Juſtice *Doddridge*, Sir *Edward Cook*, and Mr. *Selden*, that theſe were only certain Recapitulations of the King's Prerogative and the Peoples Right, then ſought to be infringed by the Pope and Clergy. That theſe Recapitulations were **abite conſuetudines**, is confeſſed, and that that Canon concerning Blood is as ancient in *England*, as the Conqueſt, our Author acknowledgeth, that *Gervaſius Dorobernenſis* reckons this Article among the Laws then eſtabliſhed, from all which the Diſcourſer of Peerage might very well argue. That which was a Cuſtom in *Henry* the Firſt's Time, taken notice and allowed in *Henry* the Second's Time, and of the beginning whereof there is no Memorial extant, nor account to be given, ought reaſonably to be eſteemed as part of the ancient Cuſtom, which is the common Law of the Kingdom. All that the grand Queſtioniſt thinks fit to reply to this, is, that it is little to his Purpoſe, becauſe this Clauſe in Queſtion is not a Limitation of their Power, but a Priviledge and Indulgence for their Abſence. That this Fancy is erroneous, I have before ſhewed from the natural Senſe of that Clauſe, as alſo, that long before theſe Conſtitutions they were both by their own Canon Law, and Cuſtom of the Nation, prohibited from being preſent in Caſes

Cook 2 Inſt. 631. Seld. ubi ſupra.

Gr. q. p. 42

and Conſultations of Blood, and that themſelves admitted not only the Liberty but the Obligation, by their conſtant Obedience given to that Law, and Cuſtom in abſenting themſelves in thoſe Caſes, as the Author of the Letter hath aſſerted, and ſhall by me be farther cleared in my Anſwer to his Precedents. Now, I do not think that this Author believeth that theſe Conſtitutions gave them a greater Liberty than they had before; but if it found them bound, that Statute left them ſo, and was as all affirmative Statutes are, though not introductory of a new Law, yet are they corroborative of the old, and, in their Oath, they ſwear Obedience to this Article as well as to the reſt; to wit, that they would, according to their Duty, be preſent in all Proceedings in Parliament, with the reſt of the Barons, except in Caſes of Blood, in which they tell us afterwards, that it was not lawful for them to be preſent at any hand; ſo that upon their Allowance, there was more than a Liberty, for there was a Law againſt them. Beſide, could this Senſe be allowed, it would no way ſerve to make good his main Hypotheſis, that they might be preſent till the definitive Sentence came to be given: for, if the Law were obligatory as to any part, why not to every part of it?

Cur

Our Aurhor is as little fortunate in his attempt to evade the Authority of *Roger Hoveden* pag. 40. who ſaith, That 'twas agreed in the Synod at *Weſtminſter*, that no Clergy-man ſhould **agitare Judicium ſanguinis.** He tels you this was part of a Canon agreed at *Toledo*, which *Ricard*, Archbiſhop of *Canterbury* thought fit to have received here, and, I think would inferr, that here was no more done then a Propoſal of this to be received, not that itw as ſo. But if we will believe *Gervas. Dorbernenſis*, in 22 H. 2 fo. 1429. An. 1175. he will tel you, they went much farther. His Words are, *Hoc concilio ad emendationem eccleſiæ Anglicanæ* **aſſenſu Domini Regis & Primorum omnium Regni** *hæc promulgata ſunt capitula.* Among which one is. *His qui in ſacris ordinibus conſtituti ſunt* **judicium ſanguinis agitare non licet,** *unde prohibemus ne aut perſe membrorum truncationes faciant aut inferendas judicent.* Here is not only a Propoſition of the Arch-biſhop but an Aſſent and Promulgation of the ſame, by the King and chief of the Kingdom. And, the true Senſe of that Canon, which being ſo confirm'd, had the force of a Law, is, That Clergymen ſhould not **agitare**, or medle in any Tryal of Blood; which certainly extends to Preliminaries, but are prohibited to make Amputations themſelves, or give their Opi-

Gr. 4. p. 42.

Ger. Dor. An. 1175.

Legis vigorem habeat quicquid de conſilio & conſenſu Magn. & Reipubl. communi ſponſione authoritate Regis ſive principis precedente juſte fuerit definitum & approbatum. vid Bracton lib. 1. cap. 1.

nion, or Judgment that ſuch Amputations ought to be made by others. Their preſence at ſuch Trials was unlawfull (*Non licet*) and their Acting prohibited.

So at laſt I have done with this clauſe; and have ſhewd that it is not indulgent but reſtrictive; that it was a cuſtom in H. 1. time, ſworn to at Clarendon, publiſhed at *Weſtminſter* 12 *years after*, *and*, by all this, made part of the Law of the Nation; have anſwered all his Subterfuges, and Evaſions, have ſhewed the Interpretation I have given was always received. I expect now ſo much Ingenuity in this Author, that he will either yield to my Senſe, or give another, agreeable to the Rules of Grammar, and the proper Signification of the Words; and not take the Liberty to explain them at his Pleaſure, and confound Voices, Moods and Numbers: Inſomuch, that this Statute will remain *Teſtimonium irrefragabile* ſtill; and I am ſure, if he obſerves his due bounds he muſt give an Interpretation equipollent to to what I have given. So hard it is for the greateſt Wits to maintain an ill Cauſe.

Gr. q. p. 44. I come now to the Conſideration of the Proteſtation made in the Parliament held in 11. R. 2. which our Author ſaith, much cleareth the whole Buſineſs, eſpecially the preface therof; for the omiſſion of which he blames the Author of the Letter. I ſhall give it you in *Engliſh*, which our Author hath not thought fit to do, and by that means depri-

deprived many of his Readers of means to make a true Judgment of it.

" **In the** Name of God, *Amen.* For as " much as by the Law and Cuſtom of " the Kingdom of *England*, it belongs " to the Arch-biſhop of *Canterbury*, for " the time being, as alſo to the reſt " of his Suffragans, Fellow-Brethren, and " Fellow-Biſhops, with the Abbots, Priors, " and other Prelats whatever, who hold " of the King by Barony, as Peers of the " foreſaid Kingdom, to be perſonally " preſent in the Parliaments of the King " whatſoever, and there, with the reſt of " the Peers, *and others that have right* " *to be there* preſent concerning the " *arduous* Affairs of the Nation, and con- " cerning other things there uſualy to be " treated of to Conſult Treat, Ordain, " Appoint and Define, and other things " to do, which there in time of Parlia- " ment are prepared, or fitted to be done. " In all and ſingular of which, We, " *William* Arch-biſhop of *Canterbury* Pri- " mate of *England*, and Legate Apo- " ſtolical for our ſelves, our Suffragans " our Felow-Biſhops, and Fellow-Brethren, " as alſo for the Abbots Priors and all " the foreſaid Prelates, do proteſt, and " every one of them doth proteſt, who " either by himſelf, or his Proctor ſhall " be here Preſent at this time publickly " and expreſly that we intend, and " every one of us will *in this preſent*

N. B. who were theſe others?

Par-

" *Parliament*, and others as Peers of the
" fore-ſaid Kingdom *after our accuſtom-*
" *ed manner*, be preſent to Conſult,
" Treat, Ordain, and Define, and all
" other things, to exerciſe together with
" the reſt that have right to be preſent
" in the ſame: The Condition, State,
" and Order of us, and every one of us,
" being ſtill ſaved. But, for as much
" as in this preſent Parliament, ſome
" matters are to be treated of, in which
" it is not lawful for us, or any of them,
" according to the Decrees of the Ho-
" ly Church, and the Canons thereof,
" to be at any hand perſonally preſent.
" For which Reaſon, we for our ſelves,
" and for every of them, do proteſt, and
" every one of them here doth alſo
" proteſt, That we intend not, nor will,
" (*becauſe according to the Law we cannot*
" *nor ought not*) *be preſent in this preſent*
" *Parliament whilſt ſuch matters are, or ſhall*
" *be treated of*: but that we, and every
" one of them, will upon that occaſion
" *all together abſent our ſelves*, our right
" of Peerage, and of theirs, as to our,
" and their being preſent in the ſaid
" Parliament, and as to our, and eve-
" ry of their exerciſing, and doing all
" and ſingular things, *our, and their or-*
" *der in all things allways preſerved.* And
" we farther proteſt, and every one of
" them proteſteth, that by reaſon of this
" our abſence we do not intend, neither doth

any

" any one of them intend, or will, that " the Trials, or Proceedings had, or to " be had, in this preſent Parliament, " upon thoſe aforeſaid matters in which " we *cannot, nor ought not* (as is premiſed) " be preſent, as much as in us lyes, or " any of them lyes, ſhall in times to " come be any way impugned, weaken- " ed, or broken.

He tells you, that this Proteſtation, ſaving the legall Formalities conſiſts of three parts. *Gr. q. p. 47.*

Firſt a declaration of their undoubted Right as Peers of the Realm, by virtue of their Baronies, to ſit, and Vote, in all Debates in Parliament. Where by the way the words are *de Regni negotiis* not *omnibus*, of the affairs of the Kingdom, not all of them, and *aliquibus* may as well be underſtood as *omnibus*: and this appears ſoon after upon their own ſhewing; for they tell you they intend to be preſent in this and all other Parliaments, and preſently after tell you it is not lawful for them to be preſent in this Parliament while ſuch matters were handled to intend to be preſent, and then tell you that 'tis not lawful to be preſent in this Parliament ſhews that their Power was limited, and not univerſal: however upon this Proteſtation they went out at the Begining, and made no Proctor; for, they tell you, they ought not to be perſonally preſent at any hand where

where ſuch Affairs are or would be treated of, which certainly was before the definitive ſentence; ſo that the Canon required their abſence at Preliminaries, accordiug to the ſenſe of all times till theſe new expounders came in place.

I will not here diſpute whether this Proteſtation be an act of Parliament: with Submiſſion to better Judgments, I think it hard that what was intended as a Proteſtation ſhould by Conſtruction be advanced to an Act, no more than his preſent Majeſties Conceſſions, upon the deſire of the Lords and Commons, in the caſe of ſome of the late Traitors, ſhould have the like conſtruction; and the entring into the Roll by the Clerk, was no more then entring into the Lords Journal now.

Mr. Hunt tells you, p. 87. that if this be a Law it is a Law only for that caſe. 'Tis true, the Proteſtation, as ſuch, was perſonal to them but the Canons I hope that put them upon a *Non licet* and *de jure non poſſumus* were not perſonal alſo; for here is a Prohibition, both by the Canon, Common and Statute Law.

But, ſince our Author hath made his Obſervations, let him give me leave alſo to make mine. Firſt, This proteſtation is cunningly worded by their own Direction, therefore their calling themſelves Peers of the Realm doth not make them ſuch in any new ſenſe; neither doth entring in their Journal Book do more than make it a Record, and render them liable to Puniſhment, if any thing unfit in it ſhall be taken notice of

An

An example of this we have in the Biſhops Proteſtation, 1641. *That all Laws to be made in their forced Abſence ſhould be void*: which could not any way weaken them, or ours here, *that they ſhould be good*, any ways ſtrengthen thoſe Laws then made. The next thing obſervable is, that he ſaith, 'Tis their undoubted Right, as Peers of the Realm, by virtue of their Baronies, to ſit and vote in all Debates in Parliament. In which Aſſertion, he begs two things: firſt, That they ſit there by Vertue of their Baronies, whereas he hath not proved they ever had any, except *tenere ſicut*, or *quaſi per Baroniam*, or *per ſervitium Baroniæ*, be equivalent with *eſſe Baronem*, which I cannot ſo eaſily admit, though they call themſelves ſo, and in ordinary Speech may be ſo called by others, that Queſtion having never been determined though admitted in Pleading by Counſel.) The Reaſons of my Doubts I have given in my firſt Chapter, and ſhall ſubmit them to more learned Judgments. They ſay, here they ſit as Barons, but allow that they have no Right to judge in thoſe Caſes then in Agitation: and notwithſtanding, it ſhould be true, that *William* the Firſt divided the Kingdom into Counties and Baronies, to hold of him in *Capite*; a County to contain twenty Knights Fees, a Barony thirteen, or thereabout: it doth not appear that every

ry Biſhop had thirteen Knights Fees, or that ſome of them had not above twenty, yet all of them held equally in *Capite*, *ſicut Baroniam*, and ſate there among the Nobility, as Aſſociates to them. I ſhall farther obſerve, that their Right to ſit and vote there was *more ſolito*, as they had uſually done, and this with a *Salvo*, or Saving to their State and Order: ſo that except our Author had firſt proved that 'twas their uſual manner to vote and judge in matters of Blood; and that this was agreeable to their State and Order which themſelves deny, he hath done nothing: for, they pretend not to any other Right but what they uſually enjoyed, and what was agreeable to their State and Order. Let now our Author take what Advantage he can from the Preface to the Proteſtation; for the Omiſſion of which, he ſo much blames the Pen-man of the Letter.

Gr. q. p. 49. The ſecond matter he affirms and attempts to prove, is, that their abſenting themſelves was merely in obedience to the Canons of the Church, and not out of Reſpect to any other Law. Yet Sir *William Baker's* Continuer, *pag.* 478. *ult. Edit.* ſaith, their Abſence was not from their Obedience to the Canon-Law only, but according to the Practiſe of the Kingdom to this day: by which it ſeems, he look'd upon it as the common Practiſe

for

for them to do ſo. For, he tells you, 'twas impoſſible they ſhould claim ſuch a Right by virtue of their Baronies, or that the Lords ſhould allow ſuch a Proteſtation if there were any other Law againſt them then in force: And that if this Proteſtation were a Law, the Caſe was more ſtrong on their ſide: for, then it declares they had that Right they pretended to, by Law. Should I admit this for once? Doth it not alſo as ſolemnly declare, that in Caſes of Blood they are barred by the Canon-Law, and ſo make that Bar a part of the matter enacted. But for a fuller Anſwer and Diſcharge of what he urgeth, without repeating what I have ſaid before, as to the Proteſtation it ſelf, let me put him in mind, what I doubt not he knows, that all Arguments *ab impoſſibili*, or Deductions *ad impoſſibile*, are the weakeſt ways of Demonſtration, and never uſed where any other can be brought, which at beſt, in this Caſe, can only argue a Neglect in the Lords.

But ſecondly, he may be advertiſed, that all proteſtations are entered according to the deſire of the Proteſtors, and not made an Act of the Houſe. Laſtly all this is but what they uſually did, and hath not relation to any other Matter than what was their Cuſtom, and was agreeable to their State and order, which was to abſent themſelves in caſes of Blood.

His

Gr. q. p. 51, 52, &c. His Digreſſion afterward for for two or three Leaves, about the Power of of the Pope, or his Legate to diſpenſe with Gr. q. p. 68. Irregularity, which here he calls a Penalty; in another place, the Sanction it ſelf, together with the myſtery of the Canon-Law, ſerves in my Judgment to no other end, but to ſhew, the Biſhops were generally Time-ſervers, and forced Polity and Religion to bend to their turns; forgetting that nothing is profitable which is not firſt Juſt. However, we do not hear of any Diſpenſation granted here either by the Pope or his Legate: and I would be glad this Author did let us know that his Opinion is, that the Pope or Legate, have a legal Power to to diſpence with thoſe Canons eſtabliſhed in Councils, and received by a Nation. I always did believe, that thoſe that attributed to the Pope a greater Power then I do, did not look upon him under any other Notion than as one truſted to keep, and not to break the Canons.

Having thus cleared the Proteſtation from his Objections, let us examine Gr. q. p. 41. the clear meaning of it. This Author ſaith that the very reading it is ſufficient to convince any man that the Canons were the only cauſe of their abſence. I will not deny but that it might him; but do not believe it hath Reaſon to force others to be of this mind: For, if two Laws were againſt them, to wit, the Canon-Law and the

the Common-Law, confirmed in Parliament, 'twas not unusual for those sort of men to express which of them they had most mind to. But beside this, I find no Absurdity to affirm they took notice of both, though more obscurely of the last: by a *Non licet* to the one, by a **de jure non possumus.** to the other. 'Tis not lawful for us at any hand, by the first, *viz.* the Canons, which are to us a greater Law than any other. Next, by the Law of the Land, **de jure non possumus.** Not that in it self our Presence in all Cases were unlawful, if the Canons were not in the way. But there is also another Law which prohibits us from being present in those Cases in which otherwise we might have thought it reasonable to have given our Assistance, who are no such strict Observers of the Canons, when 'tis for our Advantage to break them.

I might now proceed to the Examination of his last Head; How far the Canon Law is at this day binding. But, because I would not leave any thing untaken notice of, he thinks fit to make use of for the strengthening his Cause, I shall speak something to what he farther urgeth.

He tells you out of *Knighton*, That this Parliament was called *Parliamentum sine Misericordiâ*, and that many Circumstances concurred, which might make the Lords willing to admit of their Protestation, because their business might proceed *Gr. q. p. 53.*

better againſt the King's Miniſters. He need not have urged Inducements to perſwade the Lords to admit of their Proteſtation, except he had firſt ſhewed they had Power to have refuſed it. But by this Inducement he inſinuates, that the Biſhops would probably have obſtructed Juſtice againſt thoſe wicked Miniſters about the King. What the Accuſation was, for which ſome of them were executed, I ſhall let you ſeek in the Hiſtorians of thoſe times, being unwilling to rake into that Puddle any deeper. I ſhall therefore leave this Parliament and the myſterious Ca-
Gr. q. p. 53. nons, as our Author well calls them, and come to the Anti-Parliament to this, held
Gr. q. p. 54. in 21 *R.* 2. where, as he ſaith, the King had a Mind to undoe what was done in the Parliament in 11 *R.* 2. which Intention, this Author ſaith, he had kept in his Mind ten Years, by being willing to let the Biſhops be abſent in 11. that he might have that pretence to Queſtion in this Anti-Parliament, the things then done. An undecent Charge he lays upon the King, if it be well conſidered.

The Declaration, by help of the Biſhops, that the King's Pardon granted in Parliament, in 11. was revocable by the King, was the Labour of his Miniſters in [illegible] which thoſe Miniſters prevailed in great Meaſure; but their Actions, with the ſucceeding Murther of the D. of *Glocester*, the King's Uncle, bred ſuch a Jea-

Jealouſie and Diſtruſt between the King and his People, that I may call it the firſt Stone which left not rolling till it ended in the Ruine of that poor Prince, who continued not King much more than a Year after, and was ſoon after the Deprivation of his Crown deprived of his Life alſo.

What Art was uſed to make that Parliament ſubſervient to their ends, I need not tell you. One of the firſt Attempts was (what I touched before) to make Pardons granted by the King in Parliament, revocable at his Pleaſure; in this the Clergy were very inſtrumental. After this, the Commons come to do their Parts, and they repreſent, that divers Judgments had been undone heretofore, for that the Clergy were not there preſent; and therefore pray they might appoint ſome common *Proctor*, with ſufficient Authority to that Purpoſe. From hence he infers two things:

Firſt, That the Commons thought their Preſence neceſſary, becauſe Judgments had been undone for want of it: Therefore their Concurrence in Judgment was thought neceſſary to make a Judgment valid.

Secondly, That they ſhould therefore make a common *Proctor*. This is ſtrange Logick: Their Preſence was thought neceſſary, and Judgments undone for want of it; therefore, they ought to be preſent, I think, ought to have been the Conſe-

quent: but the Commons pray that in that reſpect they ſhould make a *Proctor*. I ſhould think now, the true Inference ought to have been, The Biſhops and Clergy ought not to be perſonally preſent in *Caſes of Blood*, yet becauſe it is fit they ſhould be repreſented, at leaſt in ſome Caſes, let them nominate a common *Proctor*, to be in their ſtead; where their Concurrence is neceſſary. This is Senſe, the other is contradictory.

'Tis evident by this Petition of the Commons, that *matter of Blood* was to be treated of; for there needed no *Proctor* for any other uſe, ſince themſelves might have been preſent. And I think it very clear by the Year-book, in 10 *E.* 4. that when Iſſue was once joyned, 'twas their Duty to abſent themſelves. For, that Book is, that the Peer queſtioned may plead not guilty, and then the Biſhops to depart; ſo that it is plain they were not to vote after Iſſue joyned, in matters of Blood. So *Hakewell*, in his *Modus Tenend. pag.* 84. before cited, ſaith, That to our days, when Queſtion is had of the Attainder of any Peer, the Biſhops are to depart. Now I take the Law to be all one, what Iſſue is joyned in a Capital Accuſation, ſo as there be any upon which the Court may proceed to Examination of the Cauſe, and to Judgment accordingly.

10 E. 4. 3.

As to our purpoſe in the caſe of the Earl of *Danby*, he pleads the King's Par-

don,

don, the King's Counſel, or the Commons, demur. The matter then in Iſſue upon the Demurrer, is, whether the Pardon is good in Law; upon which, the Biſhops, according to 10 *E.* 4. are to go out; becauſe, if the Pardon be found invalid, then muſt Sentence of Death be pronounced againſt the Criminal: for, I take the Law to be, That the pleading a Pardon in Bar upon an Endictment or Impeachment, is a Confeſſion that all the matters contain'd in the Endictment or Impeachment are true, and he ſhall never be admitted to plead Not Guilty afterward. But this by the way. Our Queſtion is about the Commons Petition, that they would make a *Proctor*, which being in *matter of Blood*, the Author of the Letter ſaith, was the only time; whether this was *Error temporis*, as one ſaith, the Error of that time, or an inconſiderate raſh Deſire of the Commons, as another, is not neceſſary to enquire: for, it doth not appear, that any Capital Judgments had been reverſed by reaſon of their Abſence, ſo that their deſire fails in the ground of it, if they meant of Capital ones: for, the firſt Judgment againſt the *Spencers* was affirmed in 1 *Ed.* 3. and the Reverſal made 15 *Ed.* 2. was made null; ſo that the Commons it ſeems were ignorant in that, and might be unadviſed in the reſt, as they ſometime have been. Beſide, if he conſult Sir *Edward Coke* in

23 *H.* 6. *n.* 41. *inter Petit comm.* and many others.

Co. 2 Inſt. pag. 286. his 2 *Inſtit. cap. de Aſportatis religioſor. pag.* 586. he doth well excuſe the Commons in ſhewing that the Biſhops were preſent at the Charge againſt the *Spencers* in 1 *Ed.* 2. ſo that the Commons might not know how far the Biſhops were conuſant of the thing, and looking only on the out-ſide, were ignorant of the Act in 1 E. 3. for the Diſcourſer ſaith, there were no more.

No, replyes the *Grand Queſtioniſt*, not in his Study, but the Commons might know of more, for we have not all the Rolls. What then? This at beſt is but a Surmiſe, and the two Judgments againſt the two *Spencers* were enough to make their Allegation true, that divers Judgments had been reverſed for that cauſe; though it be not to excuſe their Ignorance in not knowing that the firſt Judgment againſt them was revived by the Statute of 1 *Ed.* 3. And it ſeems ſtrange to me, that he that had ſo much Reverence for the then Houſe of Commons, ſhould have ſo little Reſpect to the Opinion of both Houſes now: for, the Commons unanimouſly voted, That *the Biſhops ought not to be preſent at any Debate concerning the Earl of* Danby, *or the Lords in the Tower, by them impeached of Treaſon. Journ. of Parl. pag.* 258. and 267. The Lords, about the ſame time, voted, That the Biſhops were to go out *when their Lordſhips proceeded to examine*

Journ. of Parl. pag. 258. and 267.

Guilty,

Guilty, or Not Guilty. This Author, with great Confidence, and little Reſpect, affirms, they have right to ſtay till the definitive Sentence is to be given.

But, let me now admit that it was reaſonable in the Houſe of Commons to move that they might make a *Proctor*, and that the Biſhops had alſo Right to nominate one in Capital Caſes, yet certainly, when they all abſented themſelves together, 'twas in their Choice whether they would make any or no; and conſequently, their omitting it, as in 11 *R.* 2. could be no cauſe to reverſe a Judgment, as the Commons alledged. The Reaſon is, as I touched before, becauſe they take notice of the matter in Queſtion, by hearing the Accuſation read, which is always done before they go away, which is enough to make any Act good, and to be ſaid to paſs by their Conſent, becauſe they voluntarily abſent themſelves, though with Allowance of the Lords, where their Preſence is not lawful. *Vid. Co.* 2. *Inſt. de Aſſort. Relig.* pag. 586. So that the Reaſon of the Houſe of Commons was every way weak and unſound. *Co.* 2. *Inſt.* pag. 586.

In the next place, let me examine what the Office of a *Proctor* is, being made.

It is plain by the Imperial Law, that a *Proctor* is in the Nature of an Attorney, to appear, and make Anſwer in the name of his Client, to ſuch things as the Court ſhall think fit to demand; but never,

by that, or any other, had he Power to over-rule or contradict what was the ſenſe of the Court.

I have ſeen ſome ancient Precedents of Perſons under the degree of Noble men, made *Proctors* by the Biſhops; for which, conſult Mr. *Selden's Privil. of the Baron.* pag. 5. *Hon. of the Lords Sp̃r.* pag. 27. *Elſ. Mod.* pag. 16. But in all Caſes I have met with, the ancient form runs thus. At the Parliament at *Carliſle* under *Edward* the Firſt, the Words are, **Ad conſentiendum quod tunc ibidem per dictos Prelatos & Proceres contigerit ordinari.** Another in *Edward* the Firſt's time, in a Parliament at *Weſtm.* runs thus. **Ad comparendum & audiendum pro nobis in hoc Parliamento tractanda & conſentienda.** So that their Power was but to appear and hear for them what by others were to be treated, and conſented to. Accordingly Mr. *Selden* ſaith, that in Attainders upon Appeal, they made their *Proctors* for *aſſenting* in Parliament: I hear nothing of *diſſenting*. *Sell. Privil. Bar.* pag. 5.

Seld. Priv. *Bar.* p. 5. Hon. of Biſhops, p. 27. *Elſ.* *Mod.* p. 16.

Seld. Pr. *of Bar.* p. 5.

Neither is it reaſonable to believe, the Lords would ſuffer any Commoner to ſit, and vote among them as Judges; neither do we read of any place where ſuch a *Proctor* was to ſit, having no right of his own to be there. If you will ſay he was to ſit upon the Biſhops Bench, and there to give his Vote,

Vote, you give the Biſhops Power, by their ſimple deed, to give place and vote in Parliament; which is as much as the King can do by his Letters Patents, and by which, the Patentee is enobled. Neither is it juſt to think they could any way transfer a Right for others to judge for them, where themſelves were prohibited to be preſent or judge.

It appears, that in the Parliament in 49*th.* of *Henry* the Third, there were a hundred and twenty Biſhops, Abbots, Priors, and Deans: 'tis not like there were many fewer in 21 *Richard* the Second, who was not long after him. Can any one now think the Lords would ſuffer *Thomas Percy* to diſpoſe of a hundred and twenty Votes? It had been much ſafer to have let the Clergy to have been perſonally preſent, than to unite in one man a power to over-ballance them all. I think it probable, for the Reaſons before given, that their *Procter* either ſate among the mean Officers, or that in thoſe times the Lords and Commons ſate together, and that this *Percy* was one of thoſe that ſerved for his Country. But againſt this is urged, that in *Edward* the Third's Time there were diſtinct Houſes; though before that Time they might ſit together. Sir *Ed. Coke*, *Prin*, and others

Petit's anc. Rights. p. 62. *Prin's Calender.* p. 56. and 160.

Co. 4. *Inſt. cap.* 1. *p.* 2.

Vid. Rot. Clauſ. 12 *E.* 2. *m.* 5. *dorſo.* Audley's Caſe *judic. per Prelatos Comites Barones, & totam communitatem Regni.* yet no Act. *Vid. hic* p. 133. *Vid. etiam Rot. Parl.* 50. *Ed.* 3. *n.* 131. *&* 189. *Cotton. Poſth.* f. 349. Eliz. Burgh's Caſe.

others, are of Opinion, they ſate together far in *Edward* the Third's Time: why may not that be extended to his Son *Richard* the Second, the exact time when they divided being not ſo exactly agreed upon?

I have before ſhewed out of Mr. *Petit*, *Rot. Parl.* 2 *Henry* the Fifth, *pars* 2. *n.* 10. that the Commonalty have ever been accounted a part of the Parliament. I have alſo ſhewed out of *Cambden*, *Selden*, and others, that *Baronagium* comprehended both Lords and Commons, and in all Hiſtories of thoſe Times you ſhall frequently meet with *Concilium Baronum*, **Baronagium**, and the like. Mr. *Selden* tells you, *Tit. Hon. part* 2. *chap.* 5. *no.* 16. *pag.* 689. that the Burgeſſes of ſome good Towns, as well as the Cinque-Ports, which ſtill retain the ſame name, were called **Barons**. In the ſeventeenth of King *John*, *dorſ. clauſ. memb.* 7. *Baronib. Germuthæ Gipſwici Norwici*, &c. *Mat. Paris*, *Anno* 1253. *pag.* 863. ſpeaking of the Citizens of *London*, hath theſe Words, (being engliſhed) Whom for the Dignity of the City, and the ancient Liberties of the ſame, we uſually call **Barons**. Of this Identity of Names we can give no better account, than becauſe they were uſually joyned with the other Barons in great Councils, of which there were alſo two ſorts. *Gervaſius Tilburienſis part* 2. *cap.* 13. ſpeaks of **Barones majores** and

Seld. tit. hon. p. 689.

Ger. Tilb. *Fitz. Mat. Paris.*

and **minores**. *Fitz-Steph. cap.* 11. mentions **secunde dignitatis Barones**. In the *Mag. Char.* of King *John*, *Mat. Par. Anno* 1215. mentions a Summons to a Common Counsel of the greater Barons by the King's Writ, and of other Tenants in *Cap.* which were *Barones minores* by the Sheriff, but all of them comprehended under the general Name of *Barones* or *Baronagium*; under which general Name, all meeting who had any Right to come, either as *Barons* or *Freeholders*, we have no reason to believe they did not all sit together in the same Counsel, whereunto they were summoned under the same Name. The old *Modus*, put out in *English* by *Hakewell*, with his seeming Approbation of the Book, saith, in his Chapter concerning Cases and Judgments that are heard, that every degree might go by it self, and consider of it; by which it appears, they then sate together. *6 Edw. 3. Elsing. p. 96.* and *99.* saith, in two Parliaments they went apart, and in one gave Subsidies apart. The Case is in *50 Edward 3.* where the cause of Summons being shew'd, the Commons were willed to withdraw to their ancient place, and consult among themselves, proves no more than that they had a place to go to when 'twas fit they should consult apart, not that they always

Whether this was meant of a Parliament or other Council, not material to this point, the Reason being the same as to meeting upon Summons to the one or t'other.

Hakewell. *pa.* 18.

always did so; no more than it doth that the Prelates sate not among the Lords, because they sometimes went apart, and had a place to go to as well as the Commons. We know, that 7 *Jacobi*, when Prince *Henry* was created Prince of *Wales*, they all sate together in the Court of Requests, and may do again when the King pleaseth.

I have now done with this rather curious than necessary Question, which I had not touched upon, had not *Percy*'s place in Parliament given me occasion a little to search into it. Yet I think it not amiss here to insert the Prayer of the Commons, and the form of the *Proxy*, made by the Clergy to Sir *Thomas Percy*, in 21 *Rich.* 2. *memb.* 6. *no.* 9. as it is at large upon the Record, that the Reader may be able to give a rational Judgment both what his Power was, and how the Clergy were represented by him.

21 *R.* 2. *memb.* 6.

The Commons first pray the King, that whereas divers Judgments and Ordinances before time, made in the time of his Progenitors, had been recalled and made null because the *Estate of the Clergy were not present*, Et pour ceo prierent au Roy que pour surety de sa person, & salvation de son royaum les Prelates, & le Clergy ferroient un Procurateur avec povoir sufficient pour consentir *en leur nome, a toutes*

N. B. 'Tis plain, by Clergy here was more meant than the Bishops only; for the Abbots were reckoned as part of the Clergy, I suppose.

toutes choſes, & ordonances a juſtifier en ceſt preſent Parlament, & que ſur ceo chacun ſeigneur ſpirituel diront pleinment ſon avis. Sur quoy le dits ſeigneurs ſpirituels commetterent leur plein povoir generalment a un lay perſonne, & nomerent un eſpecial Thomas Percy *Chevalier, & ſur ceo baillerent au Roy une ſchedule contenant leur povoir, la quelle noſtre ſeigneur le roy receuſt & commanda (le dit. Mardy) eſtre entre de record, en rolle de Parlement* **de quelle cedule la form enſuit.**

Nos Thomas Cantuarienſis, & Robertus Ebor. *Archiepiſcopi ac prælati, & Clerici utriuſque provinciæ Cantuar. & Eborac. jure eccleſiarum earundem habentes jus inter eſſendi in ſingulis Parlamentis Domini noſtri Regis, & regni Angl. pro tempore celebrandis, nec non tractandi, & expediendi in eiſdem quantum ad ſingula in inſtanti Parlamento pro ſtatu & honore Domini noſtri Regis nec non Regaliæ ſuæ, ac quiete, & pace, & tranquillitate regni judicialiter juſtificand. Venerabili viro Domino* Thomæ de Percy *Mil. noſtram plenarie committimus poteſtatem: ita ut ſingula per ipſum facta in præmiſſis perpetuo temporibus habeantur.*

It is obſervable in this Prayer, the Commons recite Ordinances as well as Judgments, to have been made null by reaſon of the Biſhops Abſence, and comprehended not Judgments alone. Now of what Latitude Ordinances were taken, whether temporary, or otherwiſe look'd

look'd upon as Laws, is not very certain.

Secondly, they desire such a Proctor as might have Power to consent to such things as should be done.

Thirdly, they naming a Lay-man who had no Right of his own to sit there, and giving the King a Schedule of their Procuration, was enough to make their Right be preserved to them without any explicite Consent by their *Proctor*, or perhaps his being so much as present at any Debate.

Gr. q. p. 57. But I now proceed to observe how ready our Author is to pick what Advantage he can against the Author of the Discourse of Peerage, from the words by him quoted out of the Manuscript History written by the Abbot of *Melros* in *Scotland*, where the King of *England* sent Bishop *Fox*, as I remember, to treat with the King of *Scotland*, *James* the Fourth, then there, touching a Match between the Children of those two Princes. 'Tis a Book to be seen in some few hands, and writes of the Parliament in 21 *R.* 2. The Author of the Discourse, *pag.* 20. tells you, that that Manuscript Author blames the Prelates much for the Opinion they gave generally about the Revocation of Pardons: but in this, as in many other Authorities that make against him, our Author curtails the Words, and cites no more than makes for his turn. The

Sir *William Drumond's* Life of *James* the Fourth. *pag.* 200. *ult. Edit. in octavo.* Discourse. pag. 22.

Words

Words at large are theſe: *Dederunt ergo locum judicio ſanguinis in hoc facto. Ita quod dubitabatur à pluribus ſi non incurrerent in pœnam irregularitatis pro negotio memorato; unde contigit quod propter iſtud minus peccatum inciderent in aliud majus peccatum conſequentur, ut laicam perſonam conſtituerent procuratorem pro iiſdem qui illorum vice conſentirent ad judicium ſanguinis dandum in iſto Parliamento ſi neceſſe foret & occaſio emerſiſſet.*

" The Prelates by this act of theirs gave " Allowance or Countenance to Tryals " of Blood; inſomuch, that it was doubt- " ed by many, whether they did not " fall under the Penalty of Irregularity, " by reaſon of the foreſaid buſineſs: from " whence it happened, that inſtead of that " leſſer Offence they fell into a greater " by Conſequence, in that they made " a Lay-man their *Proctor*, who in their " Room might conſent to a Judgment " of Blood, to be given in that Parlia- " ment, if it were needful, or occaſion " had happened.

I have tranſlated **dare locum judicio ſanguinis**, to give way or Allowance to a Judgment of Blood; becauſe it appears by the ſubſequent Words, he meant them ſo, The uſe the Author of the Diſcourſe of Peerage makes of theſe Words, is to ſhew, that the Canons were not the only Cauſe that hindred their preſence in 11 *Rich.* 2. For then, when they had no Encou-

Encouragement from the King or Lords, then they ought not at any hand to be present in such Cases: but here in 21. when they had any Allowance or Connivence as to the Laws against them, then the Canons were neglected altogether.

His Inference seems to me rational and
Gr. q. p. 57. good. Oh! but saith the Grand Questionist, they were present in voting the Pardon to the Earl of *Arundel* revocable. Under his Favour, I think he is mistaken, for the Book warrants no such matter, only tells you, that they gave a general Vote, that Pardons granted in Parliament were revocable by the King; by consequence whereof, some of those who were pardoned in 11. were executed in 21. which Votes, I hope might pass, though the Parties concerned were not present, and this meaning the book seems to enforce: For, first that Author saith, it was a doubt amongst many, whether that act did not make them incur the Penalty of Irregularity, which would have been none, had they personally by their Votes revoked the Pardon granted to the Earl of *Arundel*. Secondly, he saith by making a *Proctor* in that Case of Blood, they committed a greater Fault than the former; but certainly, the making a Lay *Proctor* was not a greater Fault than actual Allowance, and personal voting in Blood, which that Author charges them with.

Lastly,

Laſtly, they made a Proctor at the beginning of the Tryal, as is manifeſt, and agreed by all; therefore the Crime charged upon the Clergy, could not but be before any Proceedings againſt any of the Criminals, except that preliminary Vote which made them guilty of Blood in that Chronicler's Senſe. In Concluſion, there was no Act to revoke theſe Pardons, but the King, it ſeems, cauſed Execution to be done upon his own Authority, and thoſe general Votes in which the Clergy were preſent: ſo that after all this Attempt, the Authority of this MSS. is againſt him.

But after all this, we have one help left, ſaith the Author of the Letter, for if this Action in this Parliament would do him any Service, the whole Parliament was repealed in 1 *Henry* the Fourth, and ſo no Authority to be laid upon it. I, but replyes the *Grand Queſtioniſt*, the Author of the Letter admits that the three *Henries*, Fourth, Fifth, and Sixth, were Uſurpers, and therefore the Repeal of that Parliament void: I acknowledge the Author of the Letter ſaith ſo, but he is ſo to be underſtood as the Law is now taken, not as it was then; for, we ſee *Henry* the Fourth in Parliament claimed the Crown as his Right, as being Heir to *John* of *Gaunt*, fourth Son to *Edward* the Third; whereas the Title of *Mortimer* who was by another Parliament declared

Gr. q. p. 58.

next Heir, arose by his Marriage with *Philippa*, Daughter and Heir to *Lionel* Duke of *Clarence*, who was the third Son to *Edward* the Third: but it was never before determined, that the Daughter of a third Brother should be preferred in Succession to the Crown, to the Son of a Fourth. We see *Maud* the Empress, Daughter to *Henry* the First, could not be received Queen, though she attempted, and sought for it, neither ever had we a Queen since the Conquest till that time. Nor can I divine how long it might have remained a Question, had not that Controversie been determined by the happy Union of both Titles in *Henry* the Seventh, who married the Daughter and Heir of the house of *York*.

The next Question will be, how far Laws made by an Usurper generally received, and accepted by the People upon the resignation of the immediate precedent Possessor shall be esteemed valid.

I fear, if we make such Laws void, we must find some new way to make many of ours good till *Henry* the Second. Was not *Robert* eldest Son to *William* the First, alive till toward the latter end of the Reign of *Henry* the First, who about the eighth Year after he was King, deprived him of his Eyes; after which, he lived a Prisoner twenty six Years? *William Rufus* had no better Title than the Acceptance of the People, and his Com-

position

poſition with his Brother *Robert*, who reſigned his Title for 3000 Marks *per an.* *Henry* the Firſt ſucceeds by Title no better, till *Robert*'s miſerable Death, which happened in the thirty fifth year of his Reign, and about a year before his death. After him, *Stephen* ſteps into the Throne, help'd by two powerful Friends, the Biſhop of *Wincheſter* the Popes Legate, his own Brother, and the Biſhop of *Salisbury* his great Friend, and this in the Life of *Maud*, Daughter to *Henry* the Firſt, and his own Brother *Theobald*, whoſe Title, though bad, was better than *Stephen*'s, they being both Grand-children to *William* the firſt, by *Adela* his Daughter, marryed to the Earl of *Blois*. But for this great favour, and their breach of Oath to *Maud*, he promiſed great Immunities to the Church, and amongſt other, that Clergy-men ſhould not be bound to anſwer to ſecular Courts. But by our Author's Logick, this Conceſſion was void, and the Clergy had no reaſon to complain, becauſe the old Law was revived at *Clarendon*. At laſt, to ſodder all, a Compoſition was made, that *Henry*, *Maud*'s Son, ſhould have the Crown after *Stephen*'s death; which was performed by her Conſent, *Maud* being then alive, who having ſtrugled for the Crown as much as ſhe could, was at laſt contented with this Compoſition, which was the only legal Title King *Stephen* had, and

no more voluntary in *Maud* than was that of *Richard* the Second. But at length *Maud* dyes, and *Henry* the Second and his Son *Richard* the firſt, enjoyed the Crown in their juſt Rights.

After their Death, *John* comes upon the Stage, in the Life of *Arthur* his elder Brother's Son, ſo that here we have another Uſurper; after whoſe death, and the death of *Arthur*, *Henry* the Third had a good Title, whoſe Deſcendents enjoy it to our Time; for the Quarrels between *York* and *Lancaſter* were not about the Line, but the Perſons; inſomuch, that till *Henry* the Third, the beſt Title to the Crown was the Acceptance of the People, and particular Compoſitions with thoſe who had the greater Right. Come we nearer home, to the time of *Henry* the Seventh, who after the Death of his Mother, and his Marriage with the Daughter and Heir of *Edward* the Fourth, was rightful King. His Eldeſt Daughter was marryed into *Scotland*, from whom, our preſent King enjoys his Crowns, upon an unqueſtionable Title. We will now come to his Son, *Henry* the Eighth: he had two Daughters, *Mary* and *Elizabeth*, the firſt by *Katharine*, his elder Brother *Arthur* his Relict; the ſecond by *Anne* of *Bullein*, born in the Life of his firſt repudiated Wife Queen *Katharine*. *Mary* was by Act of Parliament declared a Baſtard, as born within unlawful Eſpouſals:

ſals: *Elizabeth* after the Diſgrace of her Mother, was ſerved in the ſame kind, yet we ſee both of them ſucceſſively enjoyed the Crown by virtue of another Act which entailed it upon them, with the approbation of the people; whereas, otherwiſe the true Right would have been in *Mary* Queen of *Scots*, our preſent Sovereigns great Grand-mother. I might purſue this Theme through *France*, in the caſe of *Hugh Capet*; through *Spain*, in the family of the D. of *Medina Celi*; and at preſent in *Portugal*, but I will not go out of our own Kingdoms; and have ſaid enough to make it manifeſt, that Laws may be made or repealed by ſuch Kings as are in Poſſeſſion, by Compoſition or Reſignation, with the acceptance of the People, elſe our unwary Author hath laid a foundation to overthrow or weaken, not only moſt of our Laws, but moſt of the Laws of *Europe*.

See Sir *Hen. Wotton's* Intereſt of the Princes of *Chriſtend.* this Queſtion touched upon.

Over and above all this, if the Laws of *Henry* the fourth, fifth, and ſixth, were not good, why did not the Nobility made in that time, get new Charters of Creation in *Edward* the fourth's time? Nay, what became of the whole Hierarchy? Many of the Prelates and inferiour Clergy, muſt of neceſſity be conſecrated by thoſe that were no Biſhops, and conſequently, their Conſecration and Orders by them conferred, were void, and all

our ſubſequent Clergy, who derive their Authority from thoſe who had no legal Right, extinguiſhed; a thing, in my Judgment, worth conſideration to ſuch as would avoid Laws made by actual Kings, though their juſt Title might be diſputed.

His mentioning *Oliver* rather deſerves pity for his Inadvertence, than any other Anſwer: for, he cannot but know, our late King choſe rather to looſe his Life than reſign his Power; that he never had quiet Poſſeſſion, but a Prince always ſtruggling againſt him; nor had he the acceptance of the People, or any thing but force to buoy him up, which after his Death fail'd in his next Deſcendent. By what I have ſaid, it may appear to any equal Judge, that the Laws made 1 *Henry* 4. were good, notwithſtanding his pretended Uſurpation. And as to the thing it ſelf, that the Biſhops Abſence in caſes of Blood doth not make a Judgment given, void, appears plainly by the Caſe of the Earl of *Salisbury*, in 2 *H.* 5. who petitions that a Judgment given againſt the Father, might be reverſed, and aſſigns for Error, that the Biſhops who were Peers of the Realm, were not preſent; and upon full hearing and debate, it was adjudged no Error. Now I appeal to this Author, whither he can think that my Lord and his Counſel were ſo ſtupid, as not to urge what they could

could think of for the advantage of the Earl, and the Clergy; for whatſoever other faults might be laid to the charge of his Parent, the cauſe appears to be turn'd upon that hinge: by all this we may well conclude, that the Lords in that Parliament did not hold the Biſhops ſuch Peers as ought to be allowed Judges concerning the Life and Death of Noblemen. This Judgment our Author hath not thought fit to take notice of, which might be equivalent to *error temporis*, for it was either *ignorantia* or *neglectus rei*. But he tells you, *Edward* the fourth repealed all again, in which he is miſtaken; for, *Edward* the fourth repealed nothing but what concerned the Title between *York* and *Lancaſter*, with ſome Charters to others.

I come now to his third head or point, Whether ſuppoſing that the Biſhops abſented, as he contends, only upon the account of the Canon-Law in the times of Popery, whether thoſe Laws do continue in force now ſince the Reformation: he thinks they do not. In this I ſhall be very ſhort, and againſt his Reaſons, which are rather Surmiſes than other, I ſhall return direct Authorities of Judges, and Lawyers in point. *Gr. q. p. 64.*

Firſt, he ſaith the Canon-Law was grounded upon a ſuperſtitious fancy, that to be preſent in Caſes of Blood brought upon them Irregularity, and hath there

a large Digreſſion upon the Unreaſonableneſs of the Canon-Law, in many particulars. I ſhall eaſily yield, that many of the Rules brought upon the Church by the Papacy, are full of Hypocriſie and ſelf-ends, but do not think that our Biſhops did firſt forbear from bloody Tryals about *Lanfranks* time, as if this Canon had been unknown in *England* till then, almoſt 700 years after the firſt Council of *Toledo*, for Sir *Henry Spelman* reckons that Canon to be *Anno Chriſti*, 400. and *William* the firſt came in *Anno* 1066. And in this firſt Council, this Canon is cited: but it is more reaſonably referred to the eleventh Council of *Toledo*, and the ſixth Canon, which expreſly forbids their medling in Blood; 'twill yet be about 500 years before *Williams* Time. It is therefore more probable, that their forbearance in thoſe Caſes proceeded not from any thing brought in by *Laufrank*, but was received here long before, from their obedience to the Apoſtolick Canons, which did not only forbid their medling in Blood, but in all ſecular Employments; and were carefully obſerved till *Conſtantine*'s time, who flouriſhed in the year of Chriſt 323. 'Tis likely enough, that the Liberty then taken by the Clergy was reſtrained in *Spain* by that Council. And if our Author pleaſe to obſerve it, till they came to be corrupted by Covetouſneſs and Ambition, their chiefeſt Employment

Spel. Coun. tom. 2. p. 8.

Con. Tol. 11 Can. 6.

ment was to make Peace between their Neighbours, as Chancellors and Arbitrators, rather than as Lawyers and Judges. In earneſt, whoever ſhall conſider the intricacy of the Laws of *England*, as they are called the Common-Law, will rather believe, when they ſate as Chief Juſtices, if ever they did ſo, their Seats were among others better verſed in the Common Laws than themſelves, and they ſate rather to direct what was equal according to the rules of Mercy than according to the rigorous balance of Juſtice. This certainly was their Office when they ſate with the Earl in the County-Court. Mr. *Lambert* in his Laws of *Edgar*, *cap.* 5. hath theſe words:

Celeberrimus autem ex omni ſatrapiâ conventus bis quotannis agitor cui quidem illius dioceſis Epiſcopus, & Aldermannus interſunto quorum alter jura divina, alter jura humana populum edoceto. Lamb. Laws Edgar. cap. 5.

Here you ſee the Biſhops Office was only to teach the People the Divine Law, as the Earl or Alderman did thoſe of the Land.

His next Suggeſtion is, rather a Conjecture than a Proof; to wit, that this Canon was never received, (contrary to himſelf before) or that if it were received it was in diminution of the King's Prerogative, and ſo repealed by the Statute of 25 *H.* 8. *cap.* 19. He might as well Gr. q. p. 67. See the Proviſos in the Acts.

well have ſaid, That all the Eccleſiaſtical Laws, as of Tithes, Marriages, probate of Wills, and other Faculties now exerciſed in the Eccleſiaſtical Courts, are againſt the King's Prerogative, and therefore void. What Succeſs an Attempt of that Nature lately had, he may eaſily call to mind.

But let me bring into his Remembrance, what the Statute made in the ſame Parliament, 25 *H.* 8. *cap.* 21. hath in the Preamble of it.

25 *H.* 8. cap. 21.

" Whereas his Majeſties Realm re-
" cognizeth no Superiour under God,
" but only his Majeſty, hath been, and is free from Subjection to any mans Laws, but only ſuch as have been deviſed, made, and ordained within this Realm for the Weal of the ſame, or to ſuch others as by the Sufferance of the King and his Progenitors the People of this Realm have taken at their free Liberty by their own Conſent, to be uſed among them, and have bound themſelves by long Cuſtom to the obſervance of the ſame; not as to the obſervance of the Laws of any foreign Prince, Potentate, or Prelate, but as the ancient and accuſtomed Laws of the ſame by the ſaid Sufference, Conſents, and Cuſtoms, and none otherwiſe.

We ſee here, the Senſe of the whole Parliament, That ſuch Laws as had been uſed and accuſtomed, ſhould be look'd

look'd upon as the Laws of the Kingdom, and not of any foreign Prince or Prelate. Now let him tell me, what Laws were common to us with any foreign Prelate, except the Eccleſiaſtical and Canon-Law, which having been here uſed, are acknowledged a part of the Laws of the Land by Uſage and Sufferance of the People. So that we have now a whole Parliament, that they did not look upon theſe as againſt the Kings Prerogative, and ſo null as this Author would have it; but fully confirmed as part of the *Engliſh* Law. Agreeable with this is my Lord *Coke* in *Cawdrey's* Caſe, *lib.* 5. 32. *b.* It is, ſays he, *Reſolved and enacted by authority of Parliament, that all Canons, Conſtitutions, Ordinances and Synodals provincial, that have been* by common Uſe allowed, ſhall be of force, and not to be taken away, but by Act of Parliament. *Co. lib.* 2. 32 *b.*

Now himſelf confeſſes that the Canons are againſt him; then may I well conclude, that the Law is againſt him, ſince all Canons then in uſe, are part of the Law at preſent.

Page 68. He tells you, the Sanction of this Law, which was Irregularity, is now ceaſed, and that ſome of our moſt learned Judges have declared, that is taken away by the Reformation. *Gr. q. p.* 68.

Firſt, I am to learn, that Irregularity was the Sanction of the Law: I always un-

underſtood, that the Sanction of a Law was the matter eſtabliſhed by it, obedience to which, was required under the Penalty of Irregularity; but I will not ſtand upon that, which if true, would open a door to diſanul all Laws made under a Penalty, by pardoning that. But the fore-going Statute of 25 *H.* 8. *cap.* 21. clearly ſhews, that all Canons accuſtomably uſed, are ſtill in force; Who hath then taken off the Penalty? If no body, then their forbearance in Caſes of Blood ought ſtill to be obſerved in obedience to them. Of this opinion were the Parliament, both Lords and Commons, in the Caſe of the Earl of *Strafford*; whom this Author is pleaſed to honour with the name of a Cabal; as alſo, the Proclamation to call in my Lord Keeper *Finch*, who was then fled; both which, were done in the Abſence and after the Biſhops were withdrawn, and after *William*, Biſhop of *Lincoln*, had given his opinion they ought ſo to do, and are taken notice of by the Author of the Letter, *pag.* 51, 52, 53. and by him very materially obſerved, that that Proclamation againſt my Lord *Finch*, was drawn by the Judges, by order of the Lords Temporal, after the old Parliamentary way: from whence it is eaſie to infer, that it was the old Parliamentary way, for the Judges to draw up ſuch Proclamations, by Command of the

Gr. q. p. 57.

the Lords Temporal, and that the Clergy medled not in thoſe matters. To all that hath been ſaid to this purpoſe, he hath either given no anſwer, or what makes againſt him. He tells you, that my Lord of *Canterbury* was firſt named in Commiſſion for the Tryal of the Queen of *Scots*. This ſignifies little; for here he was only a Commiſſioner, but no Judge in Parliament. Secondly, That though the Queen could not diſpenſe with the Law in general as to all Individuals, yet to any one ſhe might, and the expreſs naming him a Commiſſioner, might amount to a Diſpenſation. Thirdly, though the Arch-biſhop was named, yet he was not preſent at the Tryal; whoſe Names you may ſee in *Cambden's* Annals, *anno* 1586. and therefore the Canon was obſerved: for, what other reaſon could be given for his reſtraining that Service, but becauſe by it he might have become irregular. I ſhall add one or two Authorities more, and ſo conclude the point. Arch-biſhop *Abbot* in King *James* his time hunting in one of his own Parks, ſhooting at a Deer, by an unfortunate Glance of his Arrow, kill'd his Keeper: much Debate there was, whether this Act had made him irregular; and that it did ſo, was ſtrongly argued by *Williams*, Biſhop of *Lincoln*, then Lord Keeper, who ſaid, that

Whitgift was then Arch-biſhop. *Cambd. An. Anno* 1586. and *Baker*, 391.

that by the Canon-Law then in force, he was *ipso facto* irregular. Here you see the Canon-Law was then deemed in force, and Irregularity to be by it contracted. At last, Commissioners were appointed to examine the business, whose Names you may see in *Rushworth*, both Divines, Civilians, and Common Lawyers. After a full Debate, they agreed he was not irregular; for this was no Crime, and therefore by Law could not contract Irregularity; for, by Law the Arch-bishop was allowed to hunt: this accident being only Chance Medley, could not bring any Guilt upon him. But there was not the least Doubt made of the Canons being in force, and that Punishment might be inflicted upon the Breakers of them. *Baker's Chron. pag.* 446. who being then a man of good Age, made this Relation upon his own knowledge.

Rush. hist. Col. part p. 61.

Baker. pag. 445.

Gr. q. p. 69. This may serve in Answer to his Reflection upon Dr. *Oates*, that he hath incurred Irregularity by his Discovery of the Horrid Plot, not yet fully examined, for this Discovery was but his Duty; so far was it from being a Crime, that it deserved, and hath already found some Reward from his Majesty.

Of the same Opinion was Arch-bishop *Laud*, with the rest in the Star-Chamber, in the Censure of Dr. *Leighton*; where Arch-bishop *Laud* would not suf-

Rush. hist. Coll. part 2. *pag.* 56.

fer

ſer any corporal Puniſhment to be inflicted upon him until he was firſt degraded, nor his Ears to be cropt in St. *Paul*'s Church-yard, becauſe the Ground was conſecrated; now Degradation and Conſecration of Places, are the Fruits of the Canon-Law. Laſtly, one *Madie* was in the High Commiſſion Court Paſ. 4 *Car.* 1. declared irregular, and deprived for the ſame, having firſt, as was alledged, preached after Suſpenſion. By all which it plainly appears, that Irregularity may be incurred at this day; and therefore thoſe Canons not againſt the King's Prerogative, nor conſequently, taken away by the Act of 25 *Hen.* 8. but that Irregularity may ſtill be contracted by the breach of them. *Ruſh. com.* 2. *App.* p. 15.

I have now done with his two firſt Chapters, which contain the ſubſtance of his whole Book, and have ſhewed;

Firſt, that it is not clear that Biſhops were Barons, otherwiſe than by Appellation; that they were never enobled in Blood; that no Inſtrument can be produced what Baronies were annexed to their ſeveral Poſſeſſions, whoſe Biſhopricks have the Title common to other Noblemen; as *Lincoln*, *Carliſle*, *Bath*, *Worceſter*, *York*, and others, which is not uſual, that one ſhould be Duke or Earl, and another Baron of the ſame place, beſide the ſuperfetation of Baronies,

nies, by dividing one Biſhoprick into ſeveral Baronies. But, that it is much more reaſonable to believe that their Tenure in *Cap.* by Baronage Service, which was impoſed upon them as a burthen, not an honour, might cauſe them to be called to Parliament as *Barones minores*, leſſer Barons, but not left out at the King's Pleaſure, as the leſſer Barons were, becauſe they were to ſummon the Clergy to Convocation.

Secondly, I have made it apparent, that the Convocation is properly the third Eſtate in Parliament, of which they conſtitute the upper Houſe, and not other than a part of a third Eſtate among the Lords.

Thirdly, Admitting they were a third Eſtate in the Lords Houſe, entire as ſome think, there could be no colour for their Tryal of a Noble-man, who is a Member of another Eſtate.

Fourthly, the Canons of the Council of *Toledo*, were not the firſt cauſe of their abſenting themſelves in caſes of Blood.

Fifthly, I have vindicated the Parliament at *Clarendon* from all his Exceptions, and made it very plain by the natural conſtruction of the Words, as well as by the Interpretation of his own Author *Fitz-Stephens*, they are not to be preſent at any Conſultations or Debates, where the end may be Blood;

and

and that the Proceedings in the Council at *Northampton* make fully againſt him; as alſo, his Fancy that the Biſhops had Right to be preſent till the definitive Sentence concerning Blood was to be given, is againſt the Opinion of both Houſes, in the laſt Parliament.

Sixthly, I have ſhewed that the Proteſtation made 11 *Richard* the Second, if it were not a Law, was a ſolemn Confeſſion by themſelves, that the Canon-Law was againſt them, and further given great Probability that there was in it reſpect had to the eſtabliſhed Law of the Kingdom.

Seventhly, I prove that the Canons are ſtill in force, that they are a part of the Law of *England*, and not to be annulled but by act of Parliament, and that Irregularity is not taken away by the Reformation.

Laſtly, I have given clear Anſwers to all his pretended Authorities and Reaſons urged in his ſecond Chapter, and ſhewed, that they are either not to the Purpoſe, or miſapplyed, or againſt him.

I ſhould now come to examine his Precedents in his third Chapter, and aſſert the manner of Tryal of Biſhops by common Juries, but that is fully done by the learned Author of the Diſcourſe of Peerage; and for Precedents, if there were any, as I think,

there are not yet, the Law being against him, they would signifie little. Yet, least he should think himself neglected, I shall in the next Chapter take them into Consideration.

CHAP. III.

I Will not be long in the Examination of his Precedents; because, in my Opinion, the Lords in the last Parliament have determined the Controversie. For, our Author contends, that the Bishops have Right to be present till the definitive Sentence comes to be given, and longer if they please, for he sets them at Liberty. Now the Lords in their explanatory Votes, made *May* 15. 1679. have declared, That the Bishops have Right to sit in Court till the Court proceed to the Vote of Guilty or Not Guilty. Tho' this their Lordships have now admitted be a Liberty greater than, I think, their Predecessors ever enjoyed, who in Cases of Blood went out at the beginning, yet this Vote takes from them all Power of Judicature as Peers to the Lords, for it gives them no Liberty to pass any Vote, but only allows them to sit

Gr. q. p. 32.

Journ. of Parl. pag. 258.

Vid. Hakewell *mod.* p. 84.

ſit as Spectators, but reſerves the Judgment to themſelves.

I perceive this Author is not willing to give much credit to the Relation of *Brompton*, touching what he reporteth of the King's appealing Earl *Godwin* of the Death of his Brother. I will not concern my ſelf in this matter, it being before the *Conqueſt*, and a Story in which the Relaters much differ; ſome ſay 'twas at the Table, others in Council (why not in both?) next his Appeal is to the Earls and Barons. I wonder our Author doth not ſay that the Biſhops were here meant by Barons. For if there were then no Barons, ſome others muſt be comprehended under that name; and not long after, our Author tells you, the Biſhops were comprehended under that Name in the caſe of *Hamel. Vid. Leg. Edvar. conf. cap.* 8. *& nono de decimis & apibus*, where the Name *Barons* is uſed before the *Conqueſt*. I will not give overmuch credit to this Relation of *Brompton*, the rather, becauſe *William* of *Malmsbury* looks upon it as a Romance; for he ſaith, *Rumigeruli ſpargunt, Cronica tacent*. Yet perhaps *Brompton*'s Authority may go hand in hand with *Fitz-Stephen*. But, admitting the Story had ſome Truth in it, his Endeavour to prove the Biſhops preſent, is not unpleaſant. *Gr. q. p.* 70. *Quere* What that Word then meant. *Gr. q. p.* 73

He tells you, after the Converſion of *Ethelbert*, they were never abſent in any Councils of the Nation that were Publick, and that there was then no Canon to be afraid of; for the Council of *Toledo* was brought in by *Lanfrank* ſome time after. Firſt he aſſumes a Negative, they were never abſent; which cannot be proved, except by one who had lived all thoſe times. Next he tells you, they had no Canon to be afraid of: it ſeems they lived then without Rule; I do not believe this Author would have them do ſo ſtill. Thirdly, he ſaith that Council of *Toledo* (take the firſt or the eleventh, the laſt of them about five hundred years before) was firſt brought in by *Lanfrank*. I think the ſubſtance of that Council was obſerved before, but not eſtabliſhed as a Canon till the Synod at *Weſtminſter*, of which I have ſpoke before.

Gr. q. p. 74.

The Story of the Arch-biſhops condemning Queen *Emma*, might be as true as that other of *Godwin*, and both Romantick: but however, he tells you, the Biſhops did certainly ſit in the County-Courts at all Judgments. What their Office was in thoſe Courts, I have told you before out of the Laws of *Alfred:* as alſo you may find the ſame in Sir *Henry Spelman's Gloſſ. verb. Comes. fag.* 140, 141. where he at large diſcourſes of the Cauſes to be tryed in thoſe

Spel. Gloſſ. word *Comes.* p. 140. 141.

thoſe Courts, and tells you they were only for the eaſe of the Poor, and things of ſmall value; and that the great and powerful men had their Tryals in the Kings Courts; and more to the ſame purpoſe, which the Reader may peruſe if he ſee good: and in part are tranſcribed by the Author of the Letter. *pag.* 108, 109, 110. Now let any man judge whether the Opinion of Sir *Henry Spelman*, or his Conjecture of *Capitalia placita*, and the Legend of Saint *Cuthbert*, be of moſt Credit. The Author of the Letter tells you, that no Capital Crimes were triable in the County-Court.

But our Author tells us out of the Laws of *Edw.* the Confeſ. ſet out by *Henry* the firſt, mention is made of *Capitalia placita*, *cap.* 31. The Title of the Chapter is, *De Capitalibus Placitis.* The words follow:

In ſummis & capitalibus placitis unus Hundredus, aut comitatus judicetur à duobus, non unus duos judicet. Sic inter judices ſtudia diverſa ſunt, ut alii ſic alii aliter fuiſſe tendunt vincat ſententia meliorum & cui juſticia magis acquieverit. Intereſſe comitatui debent Epiſcopi Comites, & cæteræ poteſtates qui dei leges, & ſeculi negotia juſtâ conſideratione diffiniant. Recordatione curiæ Regis nulli negare licet alias licebit per intelligibiles homines placiti, & nemo de **Capitalibus placitis** *teſtimonio*

convincatur, &c. ——— *Unuſquiſque per pares ſuos judicandus eſt.*

In this obſcure Law there is nothing at all that ſounds like a Tryal in Criminal Matters, except our Author will ſay, that in ſuch Caſes no man ſhall be convicted by Witneſſes, when there is no other way to try matter of Fact, except his own Confeſſion: for, the Words are, that no man may be convicted by Teſtimony. Next, it is plain, *Summa*, and *Capitalia placita* are joyned together, one explaining the other; ſo that I conceive nothing more is meant than conſiderable Caſes, where the matter in Law was dubious to the Judges, who were not one Biſhop, and one Earl, but Biſhops, Earls, and other great men, and the Judgment was not to be given according to the major, but of the better Opinion of ſuch as were the Judges. The Records of the Court were not to be denyed to any man, (others it ſeems might) by underſtanding men concerned in the Cauſe. The meaning of the Law I take to be, that Caſes of Right might be tryed here of any Value, but criminal Caſes were not medled withall.

I remember not to have read any where, that *Capitalia placita* had that Signification our Author ſuggeſts; *Placita Coronæ*, *Placita Parliamentaria*, and *Placita Communia* I have met with; but *Capita-*

Capitalia Placita, for *Placita Capitalium criminum*, is new to me. However the meaning of that be, yet the Manuſcript Life of Saint *Cuthbert*, as to the thing it ſelf, will help us out. He tells you (it may be with as much Truth as *Brompton*) that one *Hamel* the Son of Earl *Godwin*, being impriſoned by the Earl of *Northumberland*, his Friends earneſtly interceded with the Earl, that he might not looſe his Head. Here indeed we find a man impriſoned by an Earl, Application made to the Earl in his behalf; no mention of any Biſhop, any Tryal, or any farther Proceeding in the buſineſs: but the Tryal, and the Biſhops Preſence at it, are both ſupplyed by our Author, who hath proved neither, or produced greater Proof than the Authority of a looſe Legend, and that lame too: and yet upon this he triumphs, as if the Point were clearly gained, when there is nothing of what he would have made good by him. Is it not now a thouſand Pities, that ſo well ſounding Words, ſo well put together, ſhould ſignifie nothing? *Gr. q. p. 74.* *Gr. q. p. 77.*

The next Precedent our Author takes into Conſideration, is that of *Nicholas Segrave*, cited by the Author of the Letter, *pag.* 55. by this Author, *pag.* 76. which he would evade, by *Lett. p. 55.* *Gr. q. p. 76.*

ſuppoſing the Biſhops might be comprehended under the Name of *Magnates*, or Counſellors, and ſhews, that ſome of the Biſhops were probably then of his Counſel. For a clear Anſwer to theſe Surmiſes, I ſhall give you ſhortly the whole Caſe, as you ſhall find it at large, *inter placita Parlam.* 33 *Ed.* 1. *Riley*, pag. 266.

Pla. Parl. 33 *Ed.* 1.

Nicholas Segrave had Summons by the Sheriff, and the Command of the King, to anſwer to ſuch things as ſhould be objected againſt him, and to hear, and ſtand to what the *Curia Domini Regis*, to wit, the Parliament, *conſideraret in præmiſſis.*

Segrave upon this Summons, *Venit in pleno Parliamento in præſentiâ ipſius Domini Regis Arch.* Cantuarienſis, *& plurimorum Epiſcopor. Comitum, Baronum, & aliorum de* (a) *Conſilio Regis tunc ibidem exiſtentium.*

(a) This *Conſilium Regis* I take to be that ſteddy Counſel that always attended the King at his Parliament, though perhaps not always Members.

Nicholas de Warwick (perhaps the King's Atturney) accuſeth him of many and great Crimes, which he offers to prove. *Segrave* confeſſeth all, ſubmits to the King *de alto & baſſo, Et ſuper hoc Dom. Rex volens habere auiſamentum Comitum Baronem, Magnatum & aliorum de conſilio ſuo injunxit eiſdem*

dem in Homagio, fidelitate, & ligeantia quibus, ei tenentur quod ipſum fideliter conſulerent qualis pœna pro tali facto ſic cognito fuerit infligenda. The *Comites Barones, Magnates*, &c. adjudge him worthy of Death. After this, the King pardons him, and orders him to put in ſeven Sureties, and to render himſelf a Priſoner at the King's Command, and to be accountable to the King for the Iſſues of his Land, held in his own or his Wifes Name: This, in ſhort, is the Caſe of *Segrave*, in which it is very clear, that at the Accuſation the Biſhops were preſent, as of Right they might be, but at the Tryal they are omitted. Now to ſuppoſe them comprehended under a general Name, and out of Order, who were particularly expreſſed when their Preſence was lawful, is both unuſual and unreaſonable: unuſual, becauſe it is againſt the Rule of Law, to comprehend the greater after the Nomination of the leſſer; and ſo to take the Biſhops under the name of great Men who are conſtantly firſt named, and were ſo here at the Beginning. Secondly, 'tis unreaſonable to make a different Conſtruction of the ſame Words in different Caſes or Laws: now we know that in the Statute *de Aſſortatis Religioſorum*, the Words are *Comites, Barones, Magnates*,

See *Coo.* 2. *Rep.* Arch. *Cant.* Caſe. Divers Caſes to that purpoſe.

nates, where we know the Biſhops were not comprehended under the Name *Magnates*, nor ought to be here; and to ſuppoſe the contrary is againſt the Current of all Acts of Parliament and Records. By the *Magnates*, and *alii de Conſilio* were meant the Judges and other Counſellors at Law, whoſe Advice the King required, as was very juſt and uſual in thoſe times. 'Tis likewiſe obſervable, that the Word *Conſilio* is written with an *(ſ)* which ſhews, thoſe Counſellors he adviſed with were not neceſſarily Members of Parliament, for then the Word would have been written with a *(c) Concilio.*

Gr. 9. P. 75. His remarkable Precedent of the *D'Spencers*, will ſtand him in as little ſtead; in the Reign of *Edward* the Second they were both condemned, and the *Exilium Hugonis D'Spencer* is to be ſeen in the old *Natura brevium.* Thoſe Judgments were afterward reverſed at *York*, in 15 *Edward* the Second; but in 1 *Edward* the Third, the firſt Judgments were affirmed, and ſo they were look'd upon as condemned Perſons, which continued (though themſelves were dead) for above ſeventy years; til by the prevailing Party, in 21 *Richard* the Second, that Act was again called in queſtion, as void, in regard the Biſhops were abſent: and the Biſhops

ſhops deſired to make a *Proctor* by the Commons, which they accordingly did; but at laſt, through their exorbitant Proceedings, that whole Parliament was repealed in 1 *Henry* the Fourth. To this I have largely ſpoken before, to which I ſhall refer the Reader, with this farther Advertiſement, that in troubleſome times things are not always carryed as they ought to be; wherefore, we are not always to look at what was, but what ought to have been done: neither are we to be governed by ſeeming Precedents, ſuch as ſometimes, as in the Caſe of Ship-money, may be produced againſt Law.

I have before made it manifeſt, that the Canons of the Church long before *Lanfrank*'s time forbad Clergy-men to meddle either in Blood or ſecular Employments; neither is it reaſonable to believe the Laws of this Land were different from the general Rule incumbent upon all Clergy-men to obſerve, eſpecially when we ſee the Immunities granted them by King *Stephen* were ſo early recalled by *Henry* the Second, and the Conſtitutions then made at *Clarendon*, look'd upon as the ancient Cuſtoms of the Nation; inſomuch, that the Diſcourſer had very good reaſon to ſay 'twas the common Uſage, which is the common Law of *England*. *Pag.*

Gr. q. p. 88. *Pag.* 88. Our Author comes to the Examination of those Records urged against him: and his Exceptions in general are:

First, That they are Negative, the Bishops were not present at Tryals of Blood, therefore they had no Right to be present.

Secondly, They were sometimes absent when they were not prohibited, therefore their Absence was voluntary.

Thirdly, they are sometimes comprehended under the Name of Peers, or Grands, and therefore may be comprehended under those Names when the Name Prelate is not expressed.

If this Author can be driven out of these holds, I shall believe he may fairly quit the Field, without any Dishonour.

Gr. q. p. 88. I shall begin with the Tryal of *Roger Mortimer*, in 4 *Edward* the Third, but we must fetch our Judgment from what was done in 28 *Edward* the Third; where, upon the desire of *Roger Wigmore*, Cousin, and Heir of *Mortimer*, that Attainder was examined, and all the Proceedings repeated; and upon the whole matter, the King charges the Earls and Barons, the Peers of the Realm, that for as much as these things principally concerned him, and them, and

and all the People of his Realm, that they would do ſuch Right and loyal Judgment as was fit for ſuch a Perſon to have. The Words upon the Record are, *Le Roy vous charge Counts, Barons, les Pieres de ſon Royaum que de ſi come ceſtes choſes touchent principalment a luy, a vous, & a tout le peuple de ſon Royaum que vous facies, au dit Roger droit, & loial Jugement come attient a un tel d'avoir.* Which ſaid Counts, Barons, and Peers of the Realm, returned and gave their Judgment, *&c.* The Words are, the King charges you Counts, Barons, the Peers of his Realm, not as our Author renders the Words, Earls, Barons, and Peers of the Realm, as if Peers were there diſtinct from Earls and Barons, when the Words import no more than who were thoſe Peers, to wit, the Earls and Barons: therefore the Author of the Letter had reaſon to ſay the Biſhops were not there who were left out in the reference made by the King, whoſe Words are, To the Earls and Barons, the Peers of the Realm. Now if the Queſtion be asked who are thoſe, muſt not the Anſwer be, the Earls and Barons? So that the Biſhops muſt be comprehended under the Names of Earls and Barons, or not at all. From whence it will follow, that this Negative

tive is ſomething more than a bare Negative, we may at leaſt call it *Negativum prægnans*, a Negative big with an Affirmative: for it is firſt told, who were thoſe Peers. Secondly, to whom thoſe Judgments belonged. Chiefly to the King and them, and conſequentially, to all the Kingdom: and whatever the Practiſe is now, I think it not hard, to prove, that anciently no Judgment, or very rarely any by the Lords in Parliament, was complete in criminal Caſes, or Execution done till it was ratified by the King; yet, that I may render all poſſible Right to the Biſhops the matter will bear, I would eaſily grant that (if they were at all ſummoned to that Parliament) they might be preſent whilſt the Proceedings againſt *Mortimer* were in reading, but went away when the Lords proceeded to the conſideration of what Judgment was to be given againſt him, which was enough to give them knowledge of the matter in Agitation, and as much as was requiſite to make them Parties, according to the Opinion of my Lord *Coke* before cited.

I ſaid (if they were ſummoned) becauſe in many ancient Parliaments I cannot find they had any Summons at all, as in 49 *Hen.* 3. 23 *Ed.* 1. 28 *Ed.* 1. 1 *Ed.* 2. 16 *Ed.* 2. and 6 *Ed.* 3. but after that were never

never omitted: ſo that 'tis probable enough, that they were not ſummoned in 4 *Ed.* 3. who were left out in the ſixth year of the ſame King. But, in this I will not be poſitive, becauſe it may be the Rolls have been loſt.

Pag. 94. He takes a more exact view of the Caſe of *Mortimer* in 4 *Ed.* 3. and preſſeth ſtrongly to have it allowed, that the Judgment againſt *Mortimer*, and ſome others, was by Act of Parliament, becauſe the Reverſal of it in 28 E. 3. was by Act: and therefore, ſaith he, we may juſtly ſuppoſe, that the Judgment againſt them was ratified in Parliament: beſide, ſome Hiſtorians ſay, he was condemned *Judicio Parliamenti*, and his own Petition is, that the Statute and Judgment may be reverſed and annulled; and from this infers, that if the firſt Judgment was by Act of Parliament, and the Biſhops not there, then they might not be preſent in their Legiſlative Right; and if they were there, then this Negative way of Argument proves nothing, that is, they *de facto* were not there, therefore *de jure* they ought not to be there. This I confeſs is ſubtle, but not ſolid; 'tis all grounded upon no greater Authority than Suppoſition. Firſt, the Reverſal was by Act, therefore the Judgment was ſo too; this doth not follow, for many Judgments in Parliament may be reverſed by Act of Parliament which *Gr.* 94.

which were not ſo pronounced. His ſecond Conjecture hath as little weight, becauſe ſome Hiſtorians ſay it was by Judgment in Parliament, therefore by Act, becauſe it is not a Parliament without the King, and Lords, and Commons; for, except this be his Argument, it is of no force at all; for it might be, and doubtleſs was, by Judgment in the Lords Houſe, which in ordinary Speech was called Judgment in Parliament; nay, how often doth himſelf infer the Preſence of the Biſhops from the Words, Full Parliament, when the Commons were not concerned, and indeed, meant no more than a full Houſe. Laſtly, *Wigmore* deſiring the Statute and Judgment might be reverſed, proves as little: for, every thing ordained that is *Statutum* is not preſently an Act of Parliament though every Act be *Statutum*. Beſide, I do not find *Statutum* in the Record, but only the Word Judgment uſed; ſo that for ought appears from our Author, the Biſhops might well be abſent at the firſt Judgment againſt *Mortimer*, and not comprehended under the Name of Peers. They have leſs reaſon to think themſelves included under the Name of Barons, if we well conſider the words of *Petrus Bleſenſis*, who living in the time of *Hen.* 2. well knew both what Honour they had, and what they pretended then to: whoſe Words are; *Qui-*

Quidam Episcopi Regum munificientias, & Eleemosynas antiquorum abusivè Baronias, & regalia vocant, & in occasione turpissimâ Servituris seipsos Barones vocant. Vereor ne de illis quereretur Dominus & dicat: Ipsi regnaverunt, & non ex me, Principes extiterunt, & ego non cognovi (sciat te accepisse Pastoris officium, & non Barohis, &c. Vacuum a secularibus oportet esse animum —— Modis omnibus cura ne secularibus te involvas; Pet. Blesens, *edit. ult. p.* 551, 552. By this learned Arch-Deacon in his Tractate *de Institutione Episc.* you may be satisfied that he did not believe that Bishopricks which arose from the Bounty of the King, or Alms of the People, were ever erected into Baronies by the King, but abusively or wrongfully so called by themselves, who being charged with the Service by the King, had a mind to attribute to themselves the Name, since they did the Service. For, he saith, they did abusively or wrongfully call their Possessions Baronies, and Royalties, and themselves Barons, both blaming, and threating them from God for so doing, and involving themselves in Secular Matters. This Author flourished in the time of *Hen.* II. ancient enough to know the truth, and how they were look't upon in those days. Moreover, I do not find it can be made appear, except conjecturally, that they were ever present, where they were not first named. The Honour of their Function makes them be called before Dukes and

See before p. 18. *in the Edition in* Quarto. Pet. Blef. *edit. p.* 551. *col.* 1, 2. *in fol.* Idem *p.* 552. *col.* 2.

Earls, and being by that reaſon *Pralati*, let no Man deprive them of their Right, and by Poſt-Poſition make them *poſt Laici*. Laſtly, This Perſon being executed in 4 *Edw.* 3. as appears by the Record in 28 *E.* 3. *Cot.* p. 85. without any Accuſation or Anſwer, makes me believe, the Biſhops being Men of Piety, would not by their Preſence countenance ſo illegal a thing, tho they had had Right, without entring their Proteſtation, manifeſting their diſlike of it; neither do I believe their Spirits ſo humble to ſuffer a Poſt-Poſition of their Titles.

Cot. p. 85.

But this whole matter, will I conceive, be better cleared, if I ſhall acquaint the Reader with ſomething more concerning this *Roger* Earl of *March*, than hath yet come to this learned Perſon's Knowledg. In 5 *Edw.* 3. the very next Year after the ſummary Judgment was given againſt *Mortimer* and *Matrevers*, a Commoner, at the Complaint of the King, we find *inter Brevia Baronibus directi*, 5 E. 3. m. 33. *penes remembrat. Dom. Regis in Scacio*; that thoſe Judgments were *per Comites, Barones, & alios Pares Regni*, not a Syllable of the Prelates; nor can the word *alios* take them in, ſince in the whole current of Records, the Prelates were never placed after Earls and Barons. And the *alij Pares*, were either ſuch as might be extraordinarily ſummoned (an uſual Practice) at that time, or they were the Barons Peers, *viz. Barones Minores*; beſides, the ſucceeding

5 E. 3. m. 33.

ding words clear the Point. For there was in 4 *E.* 3. an Agreement, and *Concordia* made by the Lords and Commons, that ſuch Proceedings ſhould not for the future be drawn into Example, to judg Commoners to death upon Summary Articles, without any Concurrence from them. Now this Concord was made by the Temporal Lords, not by the Prelates, but *per nos & Pares predictos nec non Communitatem Regni in eodem Parliamento.* Now in 4 *E.* 3. the Reference was made to the Earls, and Barons; the Peers, to whom of right ſuch Judgments belonged, and no Prelates comprehended, and here they are called *Pares predicti.*

Rot. Parl. 4. E. 3. *n.* 6.

5 E 3. ubi ſupra.

Add to this, *Rot. Parl.* 13 *E.* 3. *Numb.* 8. *Le grant des Graunts*, where an Aid was granted to the King, then in war with *France.* The Record ſaith *Les Countes & 'Barouns eſteantzen dit Parlement Granterent 'pour eux & pour leur Peers de la terre qui 'teignent per Baronie la deſme garb, la diſme 'tuzon, la diſme Aignel de touts leur demaig-'nes Terres.* Now if the Prelates were underſtood by the word Peers in this place, then it muſt be granted that the Earls and Barons taxed the Prelates, who always taxed themſelves, and the inferiour Clergy in Convocation: But the ſucceeding words will clear the matter, which run thus in the ſame Record: *Et pour ceo quil fu aviis as Prelatez Countes Barouns & autres Graunts*

N.B. Cotton *Abridg. Counts and Barons by Lords, as he often does.*

que pour les ploite des beſognes, &c. the Record is touching a ſpeedy Supply to the King. Here we ſee where the Biſhops were concerned, they were named, which ſhews they were no more comprehended under *Peers* before, than under the word *Magnates* in this Clauſe. I could multiply Records to this purpoſe, and am confident, no clear Example can be given where they were neceſſarily comprehended after Counts and Barons.

Gr. Qu. p. 95. The next Authority he qnotes to weaken the Authority of thoſe he calls Negative Precedents, is the caſe of the Murther of *John Imperiall*, a publick Miniſter ſent from *Genoa*.

This Caſe I conceive, is not truly ſtated by the Author of the Letter, and miſapplied by the *Grand Queſtioniſt*. The Point in queſtion in the Record was, what Offence the Murther of this publick Miniſter was? which matter was referred to the Judges for their Advice, who agreed that it was Treaſon within the Statute of 25 *E.* 3. This their Judgment was confirmed in Parliament, whilſt the Doubt was in Agitation among the Judges, 'twas not material who was there. But after they had given their Senſe, what was meant by this Confirmation in Parliament, is the next Queſtion: Whether more were meant than an approving of the Opinion given by the Judges, by them drawn up in form?

and

and this may well be the meaning of that whole Proceeding, which Practice is uſual in our days, but cannot be called a Judgment in Parliament, tho it might be their Opinion. But if you will rather believe it to be by Act of Parliament, then muſt the Commons be Parties, of whom we hear no mention, nor any Statute to that purpoſe extant that I can find; and in that Caſe the Biſhops might have been preſent if they would, and whether they were or not, is not material. *Vid. Cot.* 3. *R.* 2. *N.* 38, p. 183. Yea in Acts of Parliament, when the Sentence comes to be given, they are to withdraw, as it was held by Mr. *Edward Bagſhaw*, a learned Reader of the middle Temple, who for ſome Opinions by him held touching the Biſhops, was by the Power of Arch-biſhop *Laud* ſuſpended from proceeding in his reading. *Ruſhw. Hiſt. Coll. Tom.* 2. p. 990.

The next Precedent is in 5 *E.* 3. Which in concluſion, will do him as little Service as the former. The Author of the Letter *pag.* 7, 8. tells us, that that Parliament was ſummoned for redreſs of the Breach of the Law, and the Peace of the Kingdom; and the Record ſaith further, that 'twas to conſult touching Lands in *Guienne*, and the Marriage of the King; in which the Biſhops went away, and returned no more. I confeſs, I know no reaſon but they might have ſtaid, it ſeems they thought other- *Gr. Qu.* p. 82.

wiſe, being in all likelihood privy to ſome Actions to be treated there, wherein Sentence of Blood might be pronounced. But be their reaſon what you will, their words are theſe. *Et pour ceo que aviſeſuſt a les dits Prelates qu'il nattient proprement a eux de Counſeiller de la gard de la paix, & de chaſtiment de tels malvois s'allerent meſmes les Prelates.* Which words do not only import that they voluntarily went away, but that it did properly behove them not to be preſent in ſuch matters, or to give Counſel for the Puniſhment of ſuch Crimes. The ſame word is uſed in 1 *Hen.* 4. *Cot.* p. 392. where the King by the mouth of the Arch-biſhop of *Canterbury*, declares that the Commons in that Caſe were only Petitioners, and that all Judgments belonged to him and the Lords; belonged, that is, the Commons had no Right thereto; ſo here *nattient proprement* is that properly they had no Right thereto. That all Judgments belonged to the King and Lords, is only an Affirmation of the Arch-biſhop, but binds not the Commons: See *Poſtea Cottoni*, p. 350. For I think it very plain, that anciently the Commons, as well as the Lords, had their ſhare in Judicature. I ſhall touch ſome Records which the Reader may conſult at leiſure; *Rot. clauſ.* 12. *E.* 2. *m.* 5. in the Caſe of *Hugh Audley* and his Wife *Margaret*, the Relict of *Pierce Gaveſton*; they petition'd to be reſtored to certain

Cot. p. 392.

certain Lands given to *Pierce*, *A nostre Signure le Roy, & son Conſel Prelatez, Contes & Barons del' ſa terre*: the Petition was brought into full Parliament and debated, *habito diligenti tractatu in pleno Parliamento, tam per Prelatos quam per Comites, Barones, & totam Communitatem Regni, Concordatum, & Conſideratum*; 'twas ordained, conſidered, and agreed, *per Prelatos, Comites, & Barones, & totam Communitatem Regni*, that all the King's Grants to the ſaid *Pierce*, *Peter*, and his Wife, ſhould be revoked, and the Deeds cancelled. *Et quod iſtud Judicium intretur in Rot. Parliament. & in Cancellaria, & extinde mittatur in Scaccarium, & ad utrumq; Banc'um*, to be enrolled. Nothing can be plainer than that this was a Judgment, and no Act of Parliament, and that not concerning Blood, the Prelates concurred, and that probably both Houſes ſate, and voted together as one Body.

I ſhall add one Record more in a Capital Caſe, and that is entred, *Rot. Patent.* 3 *E.* 3. *pars prima mem.* 33. The Caſe of *Adam Orleton*, or *Tarleton* Biſhop of *Hereford*, and after of *Worceſter*. This Biſhop was about 17 *E.* 2. convicted of Treaſon before Sir *Henry Staunton*, and other Juſtices. In 1 *E.* 3. he petitions that the Proceſs and Record, in which there was Error, might be brought into Parliament and examined, and he reſtored to his Eſtate. *Pre-*

Rot. Clauſ. 1 E. 3. m. 13. *pro Epiſc.* Hereford.

textu hujus petitionis mandatum fuit (by a Writ) *Galfrido de Scroop* (who had the Record) *quod venire faceret recordum, & processum prædicta qua sunt in custodiâ suâ in pleno Parliamento*, where after he had assigned several Errors, the Record concludes; *Et quia videtur Dom. Regi prafatis comitibus, Proceribus Concilio Dom. Regis, & toti Communitati Regni convocatis ad Parliamentum quod prædictum recordum & processus omnino erronea sunt rationibus prædictis concessum est quod eadem recorda, & processus annullentur*, &c. This was clearly a Judgment in Parliament, in which the Commons were certainly present: and that it was not an Act, appears plainly, for the Record was certified, and Errors assigned; and 'tis worth observation, that he did not assign for Error, that he was before convicted by a common Jury, but admitted it legal. Next, I think the Prelates were not Parties to the Reversal of the Judgment given in 17 *E.* 2. for it is *coram Prafatis comitibus Proceribus*, &c. though they were at the recital of the Errors; neither is it much material, for they might very well be Parties to the Examination of a Judgment in a Capital Case; for whether they concurred either in affirming, or reversing the Record, that made them no Parties to the first Judgment, but is only a Concurrence in Opinion, that what before had been done by others, was well or ill done by them.

I

I could cite many other Records where the Commons were preſent in Parliamentary Judgments, but let theſe ſuffice.

But this may ſeem too large a Digreſſion, ſince I was upon the conſideration of 5 *E.* 3. in which I ſay,

Secondly, It doth not appear that this was an Advice taken up by themſelves; for the words are not (*fuſt aviſe par eux*) or *ils furent d'avis*, it was thought fit by themſelves, but are (*et pour ceo que avis feuſt a eux*) that is, becauſe Advice was given them by others to go away, they abſented themſelves probably in Obedience to thoſe Laws which forbad their Preſence: And they returned no more, ſaith the Author of the Letter, *p.* 8. and the Advice was given by the Lords Temporal only: No, ſaith the *Grand Queſtioniſt*, p. 102. The Biſhops and Proctors of the Clergy went only into another Room to conſult therein, which was uſual in thoſe times. I do not at all doubt but the Members of Parliament have ſeveral Rooms to retire to upon occaſion: but that in this Caſe, they did go apart to conſult, and give Advice in this Buſineſs, ſeems very unreaſonable for any one to believe, becauſe * they had but immediately before declared, that the Conſideration of ſuch matters properly belonged not to them to meddle with, and accordingly withdrew: certainly no conſiderate Man will think they went to conſult about what they

Gr. Qu. p. 102.

* N. B. *The King's going to the holy Land was then in debate, touching which, the Biſhops might well conſult.*

they in the ſame Breath ſaid belonged not to them. Beſides, we ſee the return of the Lords and Commons, without any mention of the Biſhops, and the Advice given by them by the mouth of Sir *Henry Beamont* (their Speaker) which Advice was afterwards put into a Law, and then the Prelates might be preſent, tho they were not at giving the Advice. For the Record ſaith, It was enacted by the King, Biſhops, Lords, and Commons, which then became a Law, to which the Prelates might juſtly give their Conſent in their Legiſlative Capacity, whatever it concerned. Where note, that Sir *Robert Cotton* tranſlates *Grands*, *Commons*, I think with good reaſon, though carp't at by Mr. *Prin* in the Margine, for we heard nothing of them before, and ſoon after we find them named, and undoubtedly concerned in all Proceedings before: See *Matth. Paris* p. 55. *Magnates*, Grands, comprehends Counts, Barons, Knights, or any other conſiderable Perſon, together with many others which would be endleſs to quote.

Matth. Paris p. 55. Magnates comprehendit Comes, Baro, miles, ſeu aliqua alia notabiles Perſona: *Vid. Mr.* Petyt, *p.* 101, 94, 95.

Having before ſhewed, that what our Author calls negative Precedents, were not ſimply ſo, and that the Author of the Letter had great reaſon to believe them abſent where they were not named, and where the Laws forbad their Preſence, eſpecially having on his ſide the Authorities of 4 *E.* 3. *Numb.* 1. of 1 *H.* 4. *Numb.* 80. where the Tempo-

Temporal Lords assume unto themselves the power of judging Peers, which Opinion is also made good by the late Votes of the Lords in Parliament, *May* 15, 1679. By the Case of Dr. *Leighton* in the Star-Chamber 6 *Car.* 1, It is evident that the Prelates were not look'd upon in the same sort that the Temporal Peers were; for the Information against him was for writing a scandalous Book against the King, Queen, Peers, and Prelates, where Peers and Prelates are contra-distinguished, and not taken synonymously, as may be gathered by the Sentence, and being another Body, were judged as Peers to one another, not to the Temporal Lords.

N. B. *The Abridger often translates Counts and Barons in the Record by the name of Lords, only because when the Bishops were meant Lords Spiritual, or some word equivalent was expressed.* Rush. *Hist. Col.* part 2. p. 55.

I come now to the Consideration of what he saith *pag.* 90. he there alledges that many of those the Author of the Letter calls Negative Precedents, if they prove any thing, prove too much: for some of them admit they were not present when they might have been; others, that they were present, when by his own Rules, they should have been excluded; either therefore the general words where they are not mentioned, do not enforce their Absence, or that they ought to have been excluded at some other Trials, where the Author of the Letter admits they were, or might have been present. The chief Case he instanceth in, is that of *Michael de la Pool* Chancellour of *England*, who was accused of many Misdemea-

Gr. Qu. p. 90.

demeanours by the House of Commons, and as (I think he would infer) such as *Thorp* Chief Justice, was found guilty of, being Capital: where the Author of the Letter saith, the Bishops were not present, yet allows them to have been present in the Case of this Chancellour, a parallel Case, as he saith, with that of *Thorp*: either therefore, saith our Author, they might have been present in the Case of *Thorp*, or they should have been absent in Trial of *Pool*. This is his Argument, as near as I can gather out of his Words, put together something obscurely.

N.B. *Though there were no particular Impeachment against* Weston *and* Gomenes *by the Commons, yet the general one being the delivering Forts and Castles, was Treason; at the Examination of which, the Prelates ought to be absent.* Vid. *Cr. Qu.* p. 92.

I need give no other Answer to this, than to lay before you the words of the Record.

This Accusation was exhibited by the Commons in 10 *R.* 2. against *Michael de la Pool*, Lord Chancellour, in full Parliament, before the King, Bishops and Lords, and six Articles were objected by them against him. The first was, That he purchased Lands of the King of great value, whilst he was Chancellour; the other five, as the Record saith, were only Quarrels, and of little concern.

To the first, and most considerable, the Chancellour put in a fair Answer; the Commons reply, and urge things to the utmost, and amongst other things, say, That whereas by the Popes Provisions, a Person was recommended to the Priory of St. *Anthonies*

thonies; he, the ſaid Chancellour, would not ſuffer him to be admitted till the *Grantee* had contracted to pay to the Chancellor, and his Son 100 *l.* yearly: and then paralleſ this with *Thorp*'s Caſe, and would have had the Chancellor in the ſame fault with *Thorp*, for Bribery as a Judg, and conſequently incur the ſame Judgment. The Chancellor replies, and ſhews great difference between the Caſes. Upon the whole matter, Judgment was given againſt him, purſuant to the Accuſation for Miſdemeanours only, in which the Biſhops were, and might be preſent; and the parallelling it with *Thorp*'s Caſe, was only in the Management of the Cauſe by the Commons, and no part of the Accuſation.

Neither is it reaſonable to believe that which our Author aſſerts in the ſame Page, that the Prelates were free Agents, and might withdraw at ſome times, and be preſent at others, as they ſaw cauſe. For beſide that, this is contrary to the expreſs Law of *Clarendon*, which expreſly declares that 'tis their duty to be preſent in all Proceedings *in Curia Regis*, which in that place muſt be underſtood of the Parliament, becauſe they were to be preſent with the other Lords, tho I know that *Curia Regis*, is ſometimes taken in a more laxe Senſe; for all the Courts in *Weſtminſter* are the King's Courts, and unto which they were to give Obedience and Attendance in Caſes not *Gr. Qu.* p. 90.

not prohibited. I ſay, over and above, this Act at *Clarendon*, it ſeems to me very unreaſonable to ſuppoſe, that ſuch a Body of Men had liberty to give their Attendance when they pleaſed, without leave of the Houſe, or cauſe ſhewed why 'twas fit they ſhould be abſent, or that the Author of the Letter meant more when he ſaith, they might have been preſent, than that they were not prohibited by the Law of *Clarendon*, which only had Relation to Matters of Blood. But theſe Men had other Canons to go by, when they thought fit, as well as thoſe of *Toledo*, and 'tis probable enough, that the reſt of the Noble-Men, finding them moſt conſtant Factors for the Pope, were willing enough to let them be abſent upon any colourable Pretence when they deſired it. Is not one clear Precedent againſt them in point of greater weight, than many dubious, and equivocal ones; which cannot without great Art, be wire-drawn to ſpeak to their advantage? Let him conſult the Diſcourſe of Peerage, *pag.* 17. The Caſe of the Earl of *Northumberland*, 7 *Hen.* 4. *Rot. proceſſus cor Dom. Rege in Parl.* in 5 *Hen.* 4. This Noble-Man came into Parliament, and confeſſed before the King and Lords, that he had done againſt his Allegiance, in gathering Power and giving Liveries; this Fact by the Lords, was adjudged no Treaſon, for which he gives Thanks to the Lords

Rot. Proces in Parl.

his

his Judges, and a day after, the Commons do the like, where the Prelates are named; as our Author affirms, and to which I ſhall ſpeak by and by. But in 7 *Hen.* 4. the ſame Earl was in actual Rebellion in the *North*, and his Forces diſperſed by the Earl of *Weſtmerland*; but he, and the Lord *Bardolf* fled into *Scotland*, the reſt were moſt of them taken Priſoners. This Caſe came into Parliament, where the King commands the Lords Temporal, Peers of the Realm, to adviſe what Proceſs to make, and what Judgment to render againſt the Earl of *Northumberland* and Lord *Bardolf*. Nothing can be plainer than that the King look'd upon the Lords Temporal as thoſe Peers who were proper to give Judgment touching their Fellow Peers, who had fled from Trial in a caſe of Blood: The Record goes on; the ſaid Lords adviſed thereupon, and gave Counſel to the King: Then the ſaid Lords, Peers of the Realm, by aſſent of the King, order ſummoning the ſaid Lords to appear at a day given, or to ſtand convicted by Award of the Peers in Parliament. The King farther demanded the Opinion of the Lords Temporal touching the Arch-biſhop of *York*, who was in the ſame Treaſon. The Lords Temporal, by the Aſſent of the King, and by their Authority, declared, and awarded the ſaid Earl, and Lord, to ſtand convict of Treaſon, for not appearing upon *Gr. Qu.* p. 117.

upon Summons. 'Tis very clear; that this whole Buſineſs was tranſacted by the Lords Temporal without the Biſhops, and with the Concurrence of the King. 'Tis not to be believed that the Biſhops would have ſate quiet, had they thought themſelves wronged in theſe Proceedings: See the Diſcourſe of Peerage, *pag.* 17, 18. I think it hardly poſſible to find a more clear Record in the Point than this is. Firſt, here were two Noble Lords defeated in actual Rebellion, and fled from Juſtice into *Scotland*. The King upon this, would not ſo much as conſult with his Prelates, knowing them by Law no proper Counſellours againſt Peers in matters of Blood, applies himſelf to his Lords Temporal, they order Proclamations by order of the King, enjoyning the ſaid Lords to appear at a day certain, or to ſtand convict; they not appearing, are by Award of the Lords Temporal convicted of Treaſon; and a Year after, one is ſlain, the other mortally wounded at *Bramham-moor* in *York-ſhire*. Can any thing be more agreable to the Practice at this day againſt Men that fly from Juſtice, and are convicted for non-appearance? He muſt have a new way of reaſoning, who conſidering that in 4 *E.* 3. the Earls and Barons are declared thoſe Peers, to whom ſuch Judgments belong; that in 5 *E.* 3. the Prelates declared, that in a Caſe where Blood might be, it belonged

longed not to them to be preſent; that in 7 *R.* 2. the Temporal Lords were only concerned in a Caſe where the Accuſation was Treaſon, with many other Caſes, that in 1 *Hen.* 4. the Lords are declared Judges in ſuch matters; that in 2 *Hen.* 4. in a like Trial or Judgment, the Temporal Lords are all named, who were the Judges; that now in 7 *Hen.* 4. the Temporal Lords are again declared Judges, and after all this, that the Prelates ſhould be deemed proper Judges in Caſes of Blood upon bare Surmiſes, and no direct Proof, ſeems to me to favour of a Man wedded to an Opinion which he reſolves to maintain; when at laſt, tho Precedents confirm what the Law is, 'tis that muſt determine the Controverſy. This I ſay in Relation to what Mr. *Hunt* objects. This Precedent may in part, ſerve to give anſwer to thoſe Arguments drawn from the Identity of Names, to the Identity of Right. The Biſhops ſaith the *Grand Queſtioniſt* are ſometimes comprehended under the name of Grands, Seigneurs, and Peers; therefore their Right is equal to all others who enjoy thoſe Names: How he attempts to make this good, we ſhall ſee anon. But firſt, let him conſider how weak a way of arguing this is; we know nothing is more equivocal than Names. Many are called Lords, who had once that Name, as Embaſſadors, Chief Juſtice, &c. or ſuch whoſe Fathers

Gr. Qu. p. 95.

are Dukes; ſo Earls Eldeſt Sons, yet are indeed but Commoners: ſo *Baronagium* comprehends all the whole Parliament; Barons there are of the Cinque-Ports, of the Exchequer, and of ſome chief Towns, as I have noted before from Mr. *Selden*: ſo we are not to judg the Right from the Appellation, but govern the Appellation by the Right.

The firſt Precedent he urges is, *pag.* 96. where in 4 *E.* 3. an Act paſſed for Trial by Peers, *Cotton*, *Numb.* 6. 'Tis agreed unto by the King, and all the Grands in full Parliament, that tho the Lords had tried ſome, who were not their Peers, upon Accuſation by the King in a ſummary way againſt Law, it ſhould be ſo no more. If the Biſhops were here comprehended under the Name of Grands, ſo were the Commons too, if it ſhould be an Act of Parliament; will he hence infer, that the Commons have an equal Right with the Lords becauſe they all are called Grands?

See before p. 131. *the Records there cited.*

Who were eſteemed *Grands* or *Magnates*, ſee *Matth. Paris*, *in Anno Dom.* 1100. *Inhibitio ne quì Magnates*, viz. *Comes*, *Baro*, *Miles ſeu aliqua alia notabilis Perſona*, &c. Here you ſee under *Magnates*, are taken Earls, Barons, Knights, or any other Perſon of Rank. So *Milites Comitatuum*, and

Matth. Paris *Anno* 1100. Rot. cl. 3. E. 2. *m.* 16. *in dorſo.*

and *Barones quinq; portuum*, are called *Magnates inter com. brevia de term. ſcta. trin. Sct. Mich. An.* 34 E. 1. *penes venerem. Dom. theſaurarij in Scaccario*; he that deſires more, let him conſult Mr. *Petyt*'s Learned Diſcourſe of the ancient Rights of the Commons, *pag.* 93, 94. and in ſundry other places. I think therefore I may ſafely conclude this Point: That where Grands are named alone, there not only the Biſhops, but the Earls, Barons, Judges, and Commons might be comprehended, but where the Grands are mentioned after the Earls, and Barons, there the Biſhops who ought firſt to be named, ſhall never be taken in ſecondarily, and by Implication. Neither is it any thing to our Queſtion, whether it were for their Honour to be abſent in ſome Caſes, as he intimates, *pag.* 100. in the Caſe of *Roger Mortimer*, but what the matter of Fact was. 34 Edw. 1. Gr. Qu. p. 100.

Pag. 112. He would comprehend the Prelates among the Peers, becauſe in 4 *E.* 3. *N.* 3. The words are, 'All the Peers, 'Counts and Barons aſſembled in Parliament, upon ſtrict Examination, do aſſent, 'and agree, that *John Mautrevers* is guilty 'of the Death of *Edmund* Earl of *Kent*. Here he would infer that the Prelates were preſent at the Examination of that Capital Crime, under the name of Peers, becauſe at that time, there were no Dukes, nor

See before p. 131.

others of Superiour Degree to Earls; but he doth not consider, that the word *Peers*, in this place, doth only denote who those Peers then mentioned were [Peers] *viz.* Earls and Barons, not Bishops, as before *Magnates*, viz. *Comes*, *Baro*, *Miles*, &c. As when we say a Noble-Man is to be tried by his Peers, we understand only those that are truly so, and not others that sometimes may be called so; this is much cleared by the Record 2 *Hen.* 4. *N.* 30. The Lords Temporal by the Assent of the King, adjudged *Thomas Holland* late Earl of *Kent*, *John Holland* late Earl of *Huntington*, and others, Traitors; this Judgment was after the Parties were dead, and but the second Successor after *Edward* the third. Why did not now the Prelates come in and claim their Right? Certainly they would have done it, but that they knew the Law and Practice was against them; what else is material in this Chapter, hath been taken notice of by the Author of the Letter, and others; so that it needs no further Examination: and I may safely conclude, that where the Prelates are not named, they are not understood. Now that in this case, the Bishops could not be meant by the word *Peers*, is very plain from the Record it self: For the fore-named *John Mautrevers* being not in hold, the *said Peers do pray* our Lord the King, that search should be made for him throughout the Realm, and

2 H. 4. *N.* 30

N. B. *The Judgment may well be given after the Parties are dead, an hundred Examples may be given, where their Bones have lin burned, their Bodies hanged, &c. contrary to what Mr.* Hunt *thinks.*

and a Reward promiſed. Now if the Biſhops were meant by the word Peers alone, for Earls and Barons are named, witneſs the Peers, Earls and Barons; then by Parity of Reaſon the *ſaid Peers* ſhould be meant only of the Biſhops, as if they alone had made the deſire for the Apprehenſion of the ſaid *Mutrevers*, and the Earls and Barons had been unconcerned, which is abſurd: See 4 *E.* 3. *Mem.* 3. *N.* 3. Seld. *Baron.* p. 13. 4 Law. 3.

Our Author concludes his third Chapter with the Caſe of *Henry Hotſpur*, the eldeſt Son of the Earl of *Northumberland*, who for having levied War with others againſt the King, was declared a Traitor (being before ſlain in Battel) by the King and Lords in full Parliament: this was upon *Friday* the 18*th* of *February*; upon the ſame *Friday*, upon that Caſe, and the Petition of the Earl Father to *Henry*, and Examination of his Cauſe by the Lords as Peers of Parliament, to whom ſuch Judgment belonged (for the King would then have referred the whole matter to the Judges) he was declared innocent of Treaſon, or Felony, but only finable for Treſpaſs at the King's Pleaſure: for which the ſaid Earl gave Thanks to the King and Lords, for their rightful Judgment, and alſo at the ſame time purged upon his Oath the Arch-biſhop of *Canterbury*, the Duke of *York*, and other

Lords, who were ſuſpected to be of the Confederacy with the ſaid *Henry Hotſpur*, alias *Percy*. This was the work of *Friday* the 18*th* of *February*; on *Saturday* the 19*th*, the Commons give Thanks to the Lords Spiritual and Temporal for the rightful Judgment they had given as Peers of Parliament, 5 *H.* 4 from *N.* 12, to *N.* 17. This is the whole Caſe as to Father and Son. Now whether the Biſhops were preſent at all theſe Proceedings, and how far, is the Queſtion. The *Grand Queſtioniſt* contends they were preſent at the Proceedings both againſt the Father and the Son; at that againſt the Son from the word, *full Parliament*, which he ſeemeth to infer, muſt include the Biſhops; and at that againſt the Father, from the Thanks made by the Houſe of Commons the next day after the acquittal of the Earl.

5 H. 4. N. 12. to 17.

Firſt, as to the Son: It appears plainly by the Hiſtorians of thoſe times that he was ſlain in the fourth Year of the King, in the life-time of the Father, who ſoon after broke out into Rebellion, ſo that at the time of *Henry*'s Death he was only a Commoner, and conſequently not to receive any Judgment in the Lord's Houſe alone, nor could he be made a Traitor otherwiſe than by Act of Parliament; ſo that the word *full Parliament*, muſt either refer to ſome particular Act of Parliament made

in

in his Caſe, in which the Biſhops might be preſent, and the Commons concur, or elſe the Proceedings were wholly irregular and contrary to their own Agreement, in 4 *E.* 3. Now from an illegal Act, no Right can be concluded.

As to the Earl himſelf, we find him ſuddenly after in open Rebellion, defeated, and eſcaped into *Scotland* with Lord *Bardolf*, and convicted of Treaſon by the Temporal Lords, for not appearing upon Summons, and all this within two Years after. Now can it be reaſonable to think that the Biſhops were preſent at the acquittal of this very Lord in 5 *H.* 4. who were not preſent in 7 *H.* 4. which was but two Years after, nor were preſent at a like Caſe in 2 *H.* 4. *N.* 30. againſt the Earl of *Holland*, and others, which was not three Years before? Neither can any weight be laid upon the Thanks of the Houſe of Commons, which was only matter of Complement, and performed at another time when the Houſe was aſſembled upon other matters, but ſeeing them there, might extend their Thanks to them alſo, who though they could not contribute, did nothing to hinder the Clemency of the Temporal Lords towards the Earl; beſides, at the ſame time it was accorded by the King, and Lords, upon the Deſire of the Commons, that certain ill Officers about the King ſhould be diſcharged, in which the Biſhops

Cr. Ca. p. 119. might be Inſtrumental, and very well deſerve the Thanks of the Commons, at which Deſire of the Commons, they might aſſiſt, and be abſent at the reſt.

The Precedent of *John* Lord *Talbot* will not avail him; he exhibited an Accuſation againſt the Earl of *Ormond* for certain Treaſons by him committed; this Accuſation was in the *Marſhalſea* before the Earl of *Bedford*, Conſtable of *England*. The King, to put an end to this matter, doth by Act of Parliament make an Abolition, and Diſcharge of the ſaid Accuſation, and Diſcovery. The words are, That the King by the Advice and Aſſent of the Lords Spiritual and Temporal, and the Commons, made an Abolition of the ſaid Detection. Whoever denied the Biſhops Conſent in a Legiſlative way? and had it been otherwiſe, the Commons could not have been, I think, regularly concerned.

2 H. 6. N. 9. 2 *H.* 6. *N.* 9.

The Precedent of the Duke of *Suffolk* in 28 *H.* 6. I thought to have paſſed over, being a Caſe as irregular in the Proceedings, as unjuſt in thoſe that put to death that unfortunate Man. Much Art was uſed by the Court to have preſerved him from the Envy of the People. A Parliament aſſembled at *Weſtminſter*, after diſmiſſed into *London*, then prorogued to *Leiceſter*:

Leiceſter; that diſſolved, and another called at *Weſtminſter*, in which the Duke appeared, which exaſperated the Commons againſt him. But upon the whole Record it appears that no Iſſue was joyned; for after Articles exhibited by the Commons, and his denial of them, *March* 14, at the leaſt of the eight firſt, and giving ſome Anſwers to others on the 17*th*, he was ſent for again, and the Chancellour acquainted him, that he had not put himſelf upon his Peerage, and now asketh him how he would be tried; who inſtead of pleading, put himſelf upon the King's Order, who cauſed him to be baniſhed for five Years. By all this it appears, here were no judicial Proceedings, which could not be before Iſſue joyned: ſo that although the Biſhops were preſent at the reading of the Articles; yet this can be no Precedent to entitle them to be preſent in judicial Proceedings in Capital Cauſes, for here were none at all in this Caſe, and till Iſſue joyned, the Biſhops are not bound to withdraw. Neither ought it to ſeem ſtrange that the Viſcount *Beaumont* ſhould make Proteſtation in the name of the Lords Spiritual and Temporal againſt theſe Proceedings, which they finding to be extra-judicial in very many Particulars, they did not know, I mean the Biſhops, as well as ſome of the Lords, what Conſtruction might be made to their Prejudice: for ſometimes they met in one place,

place, ſometimes in another, and not always in the Parliament-Houſe, to conſult of this Buſineſs. Beſides, many things paſs *ſub ſilentio*, which being queſtioned, would not have been allowed: theſe Obſervations being added to what hath been ſaid by the Author of the Letter, ſeems to me a full Anſwer to this Precedent, in which the *Proteſtatio* is only *Proteſtatio facti*, not *Juris*. I have thus put an end to the Examination of this third Chapter, and fully conſidered all his Arguments, and Precedents, and come now to a view of his fourth and laſt Chapter.

Viz. The Fact was not by their Advice, which they deſired to have entred.

CHAP.

CHAP. IV.

IN this Chapter our Author hath employed all his Art to aſſert the Peerage of the Biſhops, and that they make a third Eſtate in Parliament, in what ſenſe they are called Peers; as alſo that the entire Clergy, met in Convocation, make a third Eſtate, I have largely ſhewed before, and ſhall not now repeat. I admit they are ſometimes called Lords Spiritual, tho not ſo before *Rich.* II. but *Prelates* or the like, Peers of the Realm, Peers in Parliament. If by that Appellation you would make them Equals to the *Nobilitas Major*, I think they never were, yet have they many Privtledges in reſpect of their Seats and Epiſcopal Dignity in the Lords Houſe; and, by reaſon of their moſt honourable Profeſſion, have all of them Precedence to Barons. I admit alſo that the Clergy is really a third Eſtate; and that the Biſhops, in reſpect that *Gr. Q.* p. 122.

that they are the Head of the Clergy, may ſometimes in ordinary Diſcourſe be called ſo, but are in truth never ſo excluſively to the reſt of the Clergy, they all making but one Body, or third Eſtate, fully repreſented in Convocation, as I have ſufficiently, I hope, made appear, *pag.* 19, 20, *&c.* of this Diſcourſe. As alſo that they had the Appellation of Barons and Peers, not that they really were ſo, which muſt have enobled their Blood, but in reſpect of their Tenure *in Capite ſicut Baroniam*, or, *per Servitium Baroniæ*, and for the moſt part ſo called by themſeves only.

Gr. Qu. p. 151. Our Author's Suggeſtion, *p.* 151. that they ſit in Parliament in a double Capacity, as it is new, ſo is it not ſolid. He ſaith, when they ſit in the Houſe in a judicial way, they ſit only in the Capacity of Temporal Barons; and that this appears by the Conſtitution of *Clarendon*, where the King requires their Attendance as his Barons: But that in their Legiſlative Way, they have a farther Capacity, as repreſenting a third Eſtate in Parliament, I ſay this Fancy is new; for I do not believe any before him look'd upon them as repreſenting a third

Eſtate

Eſtate in Parliament: and not repreſenting it, I know they have been ſaid to ſit in reſpect of their Poſſeſſions, which are Temporal in their own nature, but not ſo when given *Deo & Eccleſiæ*; but that they ſate in any other Quality than Spiritual Perſons, I never heard, nor can conceive. Methinks if they have a Capacity to ſit in the Quality of Temporal Barons, they ſhould alſo have a Capacity to change their Spiritual Robes, and put on Temporal. The Conſtitutions of *Clarendon*, he ſaith, require their Attendance in Judicature as his Barons; and from thence would infer they ſit in the Quality of Temporal Barons. But how doth this follow? I hope they may ſit as Spiritual Barons. But when all is done, this Allegation of his is not ſincere, for the words are, *Debent intereſſe judiciis curiæ Regis ſicut cæteri Barones*; or, *cum cæteris Baronibus*; that is to ſay, 'tis their Duty to be preſent in Trials in the King's Court with the other Barons, or as the other Barons are there preſent; which words are far from inferring that they ſit there in the Quality of Temporal Barons

Barons (no more than the Judges) rather that they ſit not as Barons at all, but only amongſt them who are ſo. It is evident therefore that his firſt Argument, drawn from the Conſtitutions of *Clarendon*, is not ſolid. His next Suggeſtion, that they are a third Eſtate in Parliament (if by Parliament he mean their Convention in Convocation) from the iſſuing out of Writs to the Guardian of the Spiritualties in the Vacancy of the Epiſcopal See, I ſhall not contend with him; only I think it from hence plain, that they have Right to ſit as Members of the Convocation properly, where, with the reſt of the Brethren, they make up a third Eſtate, in which Writs there is generally a Clauſe of *Præmunientes* added, to ſhew that other Clerks are to be choſen to ſit in Convocation, for which reaſon the Guardians in their Vacancy have their Writs directed to them, leſt the Convocation ſhould not be full. Now how this can prove them a third Eſtate in the Lords Houſe, I ſhould be glad this Author would inſtruct me? ſo that his Conceit of their ſitting there in

Gr. Qu. p. 151.

a double Capacity, is of no weight, and all his Precedents cited to that purpoſe, might have been ſpared, which do not in the leaſt meaſure prove that the Biſhops ſit in the Lords Houſe as a third Eſtate; becauſe Clerks ſhall be choſen to ſit in Convocation, by Writs directed to the Guardians of the Spiritualties, where there are no Biſhops, or when they are beyond Sea, rather evinces the neceſſity of a Convocation to meet in Conſultation as to Eccleſiaſtical Matters, which are only proper for their Function.

Laſtly, Let it be obſerved that his Quotations out of the Author of the Letter, *pag.* 93. as to Doctor *Standiſh* his Caſe, are miſtaken; the Author's words are, the Judges ſaid — 'The 'Lords Spiritual have no Place in 'Parliament by reaſon of their Spi- 'ritualties (*in which reſpect, in truth 'their place is in Convocation*) but 'by reaſon of their Temporal Poſſeſ- 'ſions; that is, holding their Tempo- 7 H. 8. *p.* 184.

poral

'poral Poſſeſſions in nature of Baro-
'nies. The Scope of that Book is to ſhew that a Parliament might be held without them, who indeed were no Barons, but had liberty to ſit among them by an Indulgence in reſpect of their Poſſeſſions. And at laſt, I am perſwaded our Author will hardly be bound by that Opinion; for if that be true, how can they ſit there as a third Eſtate, if their Right to ſit there be only as Temporal Barons? This Authority is only from *Kelway*, 7 *Hen.* 8. 184. See the Caſe at large in *Burnet*.

Our

Our *Grand Queſtioniſt* goes on, and endeavours to prove, and clear that intricate matter (as it hath been made) touching the Intereſt the Clergy then had in Parliaments, as well as Convocations: but chiefly to prove, that all the Intereſt they had in Parliaments, was not meerly upon the account of their Temporal Baronies, which the Biſhops and many of the Abbots then had; this he ſaith, is the great, but common miſtake of the Author of the Letter. *Grand Queſt.* p. 260.

'Tis firſt to be obſerved, that he hath not proved, that to hold Land by Baron-Service, and to be a Baron, is all one, which by me is left doubtful, as appears by what is ſaid in the firſt Chapter of this Treatiſe. Neither ſee I any reaſon why *tenere per Baroniam*, ſhould make a Baron more than *Tenere per Militare Servitium*, ſhould make a Knight.

Secondly, That what he now ſaith, is only a Purſuit of his precedent Conceit, that the Biſhops ſit in the Lord's Houſe in a double Capacity, becauſe, as he ſaith, there is a Diſtinction made, even in Parliament, between the ſeveral Eſtates of the Clergy and Laity. How far this is argumentative, and how far his Precedents warrant what he affirms, I ſhall examine by and by; only in the mean time, would deſire him to tell me, whether they could come to Parliament at all without firſt receiving the King's Writ? and in the next place, Whether

ther the King's Writ imply any other Capacity, than as Spiritual Perſons, holding their Poſſeſſions *per Servitium Baronie*, and voting among the Lords, in reſpect of their Lands, which are in their own nature, Temporal Eſtates in the Hands of Spiritual Perſons, but by their Dedication to God, made ſpiritual alſo; which is as much as can be drawn from what Mr. *Selden* ſaith in the place quoted by our Author, *pag.* 151. That they met as Counſellors in the *Saxon*'s time in their *Wittena Gemot*, I will not deny, but whether by virtue of any Writ, Summons, or rather by general Allowance as Counſellors, or what other way, he cannot prove: Records there are none, or very few; and Hiſtorians give but a dark account of thoſe Times, and things then one: but which way ſoever they then ſate, certainly by *William* I. their right of ſitting was much altered, the Frame of things being in ſome meaſure altered alſo, in ſo much that they muſt now meet under ſuch Qualifications, and no other, as were by him allowed them, which by all Men is agreed to be as Tenants to the King *in Capite*, for their Poſſeſſions, which they held in the Nature, and by the Service of Baronies. This being ſo, I ſee not what uſe he can make of the Diſtinction made in Parliament between the ſeveral Eſtates of the Clergy and Laity. The Queſtion is not, Whether the Clergy and Laity are diſtinct Eſtates? which no Man ever denied: but, whether the

Biſhops

Biſhops, diſtinct from the other Clergy in Convocation, be an entire third Eſtate in the Lord's Houſe: that they are ſo, no Man hath yet proved. His Authority out of *Eadmerus*, ſpeaking of what was done in Parliament in 3 *Hen.* 1. ſaith, it was done *Utriuſq; ordinis concordi Curâ, & ſollicitudine*, by the unanimous care and trouble of both Orders, Ranks, or Degrees: Why muſt [*Ordo*] ſignify an Eſtate, rather than a Degree or Rank? Now I hope Men of different Degrees may ſit together without being different Eſtates. Dukes, Earls, Marqueſſes, Viſcounts, Barons, now ſit together, yet may make but one Eſtate. But let [*Ordo*] ſignify that Eſtate as he would have it, and as he thinks it doth; why muſt it ſignify an intire Eſtate? or what doth it more import, than that it was done by the Joint-Conſent of the Lords and Commons? who might then ſit together, and were not at any time left out, as is ſufficiently proved by Mr. *Petyt. Matth. Paris* his *Clerus* and *Populus*, and the other Caſes by him there mentioned, comprehended the whole Body of the Clergy and Laity met together in Parliament, including as well the Inferiour Clergy as the Superiour, ſitting in their due Ranks. All the reſt of his Precedents made uſe of by him, ſeem rather to enforce that the King is not a third Eſtate, than that the Biſhops are more than a part of a third Eſtate among the Lords. But this Point, whe-

ther the King be one Eſtate or not in Parliament; and how an Head can be conſidered as no part of the Body, I leave to others to diſpute, but muſt reſt in this undeniable Concluſion, that there can be no legal coordinate Power however the caſe ſtands: for as in the Body natural, nothing can be done without the concurrence of the Head: So in the Body Politick, nothing can juſtly be done without the concurrence of the King in matters of publick concern in Parliament, except their Proceedings deviate from the ordinary Rules of the known Laws of *England*.

Vid. *Dier* fol. 60. *Cromp. Juriſd. Courts*, p. 2.

I have put off the Examination of the firſt part of his fourth Chapter, that I might conclude this Diſcourſe with an Anſwer to the Matters he there alledgeth.

He finds himſelf preſſed with that ſtrong Argument, drawn as well from *Magna Charta*, as from divers Precedents, that the Biſhops were not Peers to Noble-Men, but were themſelves tried by a common Jury in Matters Capital; and therefore were not of Condition to try Noble-Men, who had in themſelves Inheritable Noble Blood.

Grand Queſt. p. 124.

To this Argument he oppoſes two things. Firſt, That the matter of Fact cannot be made out that a Biſhop hath always been tried by Commoners. Secondly, That if it could, it doth not overthrow their Peerage in Parliament.

This

This ſecond Aſſertion I will eaſily grant, if by Peerage in Parliament, be no more meant than a Community of Appellation by reaſon of their ſitting amongſt the Lords, and their Precedence in place, with ſome other Priviledges as to Amerciaments, days of Grace, and the like. But certainly if it can be cleared, that they have of right been tried by common Juries, and that as well before, as after the time of *Henry* the 8*th*: Nay, that they have not look'd upon the Lords in Parliament as their Peers, and proper Judges: I may then rationally conclude that they are not Peers in Parliament to that end to try, or be tried by Noble-Men there.

It is plain by all our Law-books, that out of Parliament no ſuch Priviledg belongs to them. For firſt, out of Parliament, over and above the expreſs Authority of *Stanford*, a Judg in Queen *Mary*'s time, Sir *Edward Coke*, a great Judg in our time, Mr. *Selden* a great Lawyer, and Antiquary; Mr. *Cambden*, an Herauld, great Scholar, and Hiſtorian; all agree that Biſhops ſhall not be tried by Noble-Men, and that manner of Triall hath never been put in uſe as to them. Now if this be confeſſed to be the Law out of Parliament, let the Author give me one Example, that a Man of right ought for a like Offence to be tried by one ſort of Jury out of Parliament, and another in it. The Caſe of Appeals, under which Covert he endeavours to hide himſelf,

Stanf *lib.* 1. *cap.* 3. Cook. 3*d Inſtit.* fol. 30 Seld. *Priv. of Bar.* p. 45. *and others.*

ſelf, I ſhall diſcuſs anon. The Priviledg they claimed as Clerks, was common to all other Clerks as well as to them, but there are many Caſes of Clerks tried in Secular Courts, and the Trial allowed to be good, to which purpoſe, ſee *Cook's ſecond Inſtit.* 638; but never any Exception of theirs allowed of, as if thoſe Trials were illegal. As to the Caſe of Biſhops, and their Trials by common Juries, Mr. *Selden* is very clear, and gives many Examples both before, and after *Hen.* 8th's time, which are not ſo to be ſlighted, as this Author ſeems to do. That of *John de Iſle*, the Biſhop of *Ely*'s Brother, is full to the point; where the Biſhop was arraigned, and upon Queſtion how he would be tried, ſtood upon his Priviledg as Clerk, that he was a Member of the Pope's, and therefore ought to be brought to his Anſwer before his Ordinary the Arch-biſhop of *Canterbury*, who was there ready to demand him, affirming that he ought not to anſwer before a Lay-Judg; this Plea was rejected, and a day given to the Biſhop, and a Jury impannelled, ſworn, and tried, (which ſhews he had his Challenge). The Jury bring in their Verdict, and find that the Biſhop was not guilty of the Fellony laid to the Charge of *John de Iſle* his Brother, and his Companions; but they find that after the Felony committed, the ſaid Biſhop knowing that theſe Perſons had committed Felony, did receive and harbour them: upon which, a Writ was directed

Cr. L. T. 146.

directed to enquire what Goods and Chattels he had, and his Perſon, upon requeſt of the Arch-biſhop, delivered him to be kept as it behoved him to do. Now let any Man judg whether here were not in every reſpect a legal proceeding. The matter of Fact tried by the Verdict of twelve Men: Inquiſition made concerning his Goods, Lands, and Chattels, himſelf (the Crime being only receiving of Felons) delivered to the Arch-biſhop, either to make his Purgation, or to be kept in due manner. Was here now any Willingneſs in the Court to break the Law? as our Author ſaith, *pag.* 146. or not rather a perfect Obſervation of it. Is not this perfectly agreeable to what Dr. *Ridley*, in his view of the Civil and Eccleſiaſtical Laws, ſaith *pag.* 86. 'If a Clerk 'be firſt arreſted by a Spiritual Judg, and 'found guilty, he ſhall be degraded, and 'delivered over to the Temporal Power. 'But if he be firſt arreſted by a Secular 'Magiſtrate, and tried, and found guilty, 'he ſhall be delivered to the Biſhop to be 'deprived, and then delivered back to Pu-'niſhment.

Gr. Qu. p. 146.

Ridley, *p.* 86.

The Precedent of *Thomas Merks* Biſhop of *Carliſle*, our Author allows to be againſt him: but asks whether one Precedent before the time of *Hen.* 8th, be ſufficient to expound *Magna Charta*: for in this Caſe, the Immunities of the Church were conſidered, and a Declaration by them, that their Priviledges extended not to Treaſon. But for a full Anſwer, I ſay firſt, that there are

Gr. Qu. p. 147.

more Precedents than one: but if there were not, would not one, with the conſtant Opinion of all Lawyers, and Judges, be enough to prevail with a diſ-intereſted Man, to believe that the Peers in *Magna Charta*, and the *Lex Terræ*, do not intend Biſhops to be ſuch Peers as are to receive their Trial by Noble-men? But what Exception can be taken to thoſe Caſes after, and in the time of *Hen.* 8th? Did he not continue the *Roman* Religion all his time? was it more againſt his Prerogative, than of any of his Predeceſſors? 'Tis clear enough that the Proceedings before, as well as after, were according to Law, notwithſtanding the Clamour of the Clergy, as is plain by Mr. *Selden.*

I ſhall now conſider the Caſe of *Adam de Orlton, alias Tarlton*, Biſhop of *Hereford.*

All Hiſtorians of thoſe times, as well as other later ones, ſet forth the violent Proceedings of the Clergy in that matter, who took him twice out of the Hands of Juſtice. But it appears by Mr. *Selden*, by the Record *Hill.* 17. *E.* 2. *Rot.* 87. *Dors coram Rege*, that he was arraigned in the King's Bench, and upon queſtion how he would be tried, refuſeth to anſwer there: Day is given, and the Indictment brought into the Parliament, where he makes the ſame Plea, that he is by the Will of God, and the Pope, Biſhop of *Hereford*; and that he ought not to anſwer before that Court. Here you ſee whatever the Carriage of the Clergy was, and what-ever Judgment was given againſt

Walſing. *p.* 109. Baker *p.* 174 Dan. *p.* 214 *An* 1323. Seld. *prs. Bar.* p. 147.

againſt him: His Exceptions were as much againſt any Trial in Parliament by the Lay-Lords, as elſe-where. And that conſequently the Injury they conceived done to them, was, that they ſhould be tried in any Secular Court whatſoever. This you may ſee in *Du Freſnes Gloſſary Verbo* (*Par.*) The Trial he required was, *per Epiſcopos Pares ſuos*, By the Biſhops his Peers. This appears alſo by the Complaint of the Biſhop of *Ely*, that he was brought to be tried *coram Laico Judice*, before a Secular Judg. By this our Author's Miſtake may appear, who ſaith, *pag.* 144. That they look'd upon themſelves out of Parliament as having no Peers in Judgment but Biſhops; when it is evident by the Caſe of theſe Biſhops, that they made the ſame Exception as to their Trials before the Lords in Parliament, that they did before the Secular Judges out of it, and pretended they ought not to be tried before any Lay-Judges whatſoever. Neither did they look upon themſelves under the ſame Condition that Lay-Men were; but being a diſtinct Body among themſelves, thought it reaſonable to be judged by themſelves only, and in their own Courts: an Innovation the Law never allowed, or gave any Countenance unto. I confeſs, I cannot but wonder that any one Perſon, of how great Parts ſoever, ſhould go about to contradict the Opinion of very many learned Judges, who have all aſſerted the contrary, to wit, that Biſhops ought

Gr. Q. p. 144.

ought to be tried by Commoners; and no one Lawyer of any note, that I know of, hath hitherto maintained the contrary. Methinks thoſe of the Long-Robe ſhould be tender in oppoſing the Judgments of *Stanford*, *Cook*, *Doddridg*, and *Selden*, except their Opinions were back'd by the Authority of Judges equal in Ability and Learning to thoſe before named.

Having thus cleared the Precedents urged by Mr. *Selden*, and others, from the Exceptions of this Author; let us now ſee what is alledged by him to prove that it was not always ſo, but that ſometimes they were tried by the Noble-Men as their Peers in Parliament. And to that purpoſe he propounds the Caſe of *Stratford* Arch-biſhop of Canterbury, out of Arch-biſhop *Parker's Antiq. Eccleſiæ Britan.* who tells you that *Stratford* was at the King's Suit accuſed of Capital Crimes in the Exchequer, that he put himſelf upon his Trial in Parliament; that a Parliament was called, and he, after ſome Oppoſition, admitted into the Houſe; and there, as our Author ſaith, put himſelf upon the Trial of his Peers: this it ſeems is the Relation of *Matth. Parker*. (By the way, whom he meant by his Peers, doth not yet appear) whether the Clergy only, or the Lay-Lords.

Gr. Qu. p. 126.

But let us have recourſe to the Record, as it is abridged by Sir *Robert Cotton*, 15 *E.* 3. *Numb.* 8.

15 E. 3 N. 8

The

The ſame day the King came into St. *Edward*'s Chamber, commonly called the Chamber *de Pinct*, (the painted Chamber) before whom, all the Lords and Commons, the Arch-biſhop of *Canterbury* humbled himſelf, and required his Favour, which he granted. Afterwards the Arch-biſhop deſired that where he was defamed through the Realm, he might be arraigned in open Parliament before his Peers: probably by his Peers, he underſtood the Biſhops, as others had done, and not the Lay-Lords: Beſides, this ſeems to be a Deſire of his at a Conference before the King and Lords; for it was in the painted Chamber, whereas the Commons uſually ſate in the great Refectory, now called *Weſtminſter-Hall*. Let us obſerve the King's Anſwer, which was, that he would attend the common Affairs, and after hear others; where we ſee the King did not grant his Deſire, but gave only a Dilatory Anſwer. Laſtly, it doth not appear that he was ever arraigned in Parliament; for the Record ſaith, *Numb.* 49. And it is to be remembred, that all things touching the Arraignment of the Arch-biſhop of *Canterbury* ſhould remain with Sir *William de Kedelsby*, Keeper of the Privy-Seal. By which it is evident, that theſe things were not then put into the Hands of Sir *William de Kedelsby*, but to remain there, where probably they were before, and were only ſome Papers relating to

what

what was before done in the Chequer; for I find no Arraignment recorded about that time. Two Yearsafter, *viz.* 17 *Edw.* 3. *Numb.* 22. All the Proceedings againſt the Arch-biſhop were cancelled by order from the King; ſo that nothing appears to have been done againſt him to any purpoſe, either in Parliament, or elſe-where.

'Tis true, there was a continuance of the Parliament in 15°, from day to day, for a Week, about the Trial of Noble-Men, that they ſhould not be put to anſwer, but in open Parliament by their Peers, to which purpoſe, there are named four Biſhops, four Earls, and four Barons as a Committee to draw up the Plot.

Theſe Perſons being in their Device, aſſigned, as hereafter doth enſue. Under the Name of which Peers, they bring in the Chancellour, and Treaſurer, and ſuch like Officers, and that all Eſtates ſhould enjoy their Liberties, 15 *E.* 3. *N.* 6, 7, 8. Here was indeed a Matter concerning Trials of Noble-Men had under Conſideration, but never reduced to any Law, as the Practice of ſubſequent Times, and the late Bill of the Lords about Trials, do enough manifeſt.

But doth it not appear by this Record, that the Biſhops were not reckoned Nobles of the Land, when he finds the Chancellour, and Treaſurer, and ſuch like Officers, attempted to be brought in at that time, and ſo not to have had any Right before?

before? But ſaith our Author, if after follows, that they may not loſe their Temporalities, Lands, Goods, and Chattels. Now none were capable to loſe their Temporalities but Biſhops, therefore this Law muſt have reſpect to them, as well as other Nobles of the Land.

The Anſwer to this is very eaſy, that the Clergy, who had then all Power, did endeavour to bring in their Fellows the other great Officers, who were almoſt all Church-men. *Simon Langham* Arch-biſhop of *Canterbury*, was Chancellour, *William Molſo* Dean of St. *Martins le Grand*, Receiver, and Keeper of the Kings Treaſure and Jewels, with many others, as you may find *Baker*, p. 141. Theſe had Temporalities to loſe, and ſuch Officers, the Church always hoped to have had of their own Tribe; but, as I ſaid before, of this Attempt came no other Effect than to ſhew their aſpiring Thoughts. And whatever Opinion the Author of the *Juriſdiction of the Houſe of Peers*, is of, as to the Roll of 4 *Edw.* 3. I believe the Law at this day will not be ſo taken, that a Chancellour being no Peer, ſhall be ſo tried by reaſon of his Office. I am ſure, my Lord Keeper *Bridgman* being no Peer, never voted in the Houſe of Lords, and the preſent Lord Chancellour, when he gives his Vote, goes to his place as a Baron. See *Hakewell*, p. 114. Ancient Cuſtoms, how theſe great Officers are placed in Parliament when they *Gr. Qu.* p. 128.

they are Peers, and when not; and certainly if their placing be different, their Trials ought to be ſo too. Neither can it ſeem reaſonable to any conſiderate Man, that a Perſon, though ſuch an Officer, ſhould not be capacited to give his Vote as a Baron, and yet by virtue of his Office, ſhould be tried by Noble-Men. —Therefore I muſt take leave to deny what he affirms, that they are Peers by virtue of their Office, or that they have Right to be preſent in Parliament in all Caſes of Judicature, ſo as to concur in Sentence with the Nobles of the Land, as our Author affirms, *pag.* 132. The King may make whom he pleaſes Chancellour, and the Statute aſſigns his Place, but he cannot vote there without the King's Letters Patents to that purpoſe, as I conceive: See *Old Modus*, *Hakewell*, p. 14.

Ct. Quer. 132.

I have in the firſt Chapter of this Treatiſe ſpoken largely to that Point, and ſhewed in what ſenſe a Biſhop may be called, *Peer of the Realm.* And *pag.* 90, and 91. have handled the matter of Proxies, therefore may paſs over the Caſe of Arch-biſhop *Arundel*, which our Author propoſes, *pag.* 128.

To the Caſe of *William de la Pool*, I have ſpoken before, only ſhall here obſerve, that the ſubmitting his Cauſe to the King, was no waver of his Peerage, for the matter never came to any formal Iſſue; conſider the Caſe of *Nicholas Segrave* in 31 *Edw.* 1.

31 Edw: 1:

Ridley

Ridley, p. 266. who being accuſed of many Crimes; *Segrave* being ſummoned thereunto, appears in full Parliament, confeſſeth the Fact, and ſubmits to the King. This was no Waver of any Legal Trial by his Peers, nor any diſreſpect to the Lords, who might otherwiſe have ordered the ſummoning a Jury to try the Fact, but by the King's Pardon that labour was ſaved.

The like may be taken notice of in that famous Caſe between the Earl of *Hereford* and *Eſſex*, againſt the Earl of *Gloceſter* and *Hertford*, in 20 *Edw.* 1. *Riley* p. 74. Where, upon a very long pleading, the Caſe in effect proves to be but this: The Earl of *Hereford* complains to the King, of great Robberies, Depredations, and Murthers committed by the Earl of *Gloceſter*, in his Lands in *Brecknock*, after the King's Inhibition. The King, for Remedy of this, appoints the Biſhop of *Ely*, *William* of *Valence* his Uncle, *John Mettingham*, and *Robert Hertford*, to hear the Complaints of the ſaid Earl, and alſo the Anſwer of the ſaid Earl of *Gloceſter*, and his Servants, to the Complaint of the Earl of *Hereford*, and to ſummon a Jury for the Trial of the ſame, and alſo commanded *Robert Tiptoft*, *Juſticiario ſuo de Weſtwell*, to be there preſent, and to ſummon the ſaid Delinquents to be before the ſaid Commiſſioners, and that Enquiry ſhould be made *per Sacramentum tam Magnatum, quam aliorum proborum Hominum, & Legalium de partibus Walliæ, &*

& comitat Glocest. They, that is, the *Magnates* (which it seems were Noble-Men) excepted against the taking an Oath, and said 'twas unheard of, and that they would do nothing *sine consideratione Parium suorum.* The Jury give in their Verdict against *Glocester*, the Parties all submit to the (*a*) King, who by the Advice of Archbishops, Bishops, Earls, Barons, and the rest of those who were of his Counsel, declare that the Earl of *Glocester* had forfeited his Liberties, &c. The words are, *Videtur tam ipsi Dom. Regi quam cæteris Prælatis, Magnatibus, & reliquis de Consilio ejus quoad Comitem Glocestriæ quod Libertas sua prædicta*, viz. *totum Regale in Terris suis prædictis de Merganthon cum pertinentiis pro se, & hæredibus suis foris facta est ratione delicti prædicti*, &c.

(*a*) N.B. *the Submission of the matter to the K. without any Exception by the Lords, makes the King Sole Judg, and so the Case can no longer go on in any Parliamentary Way.*

In this Record there are many things Observable; First, The Bishop of *Ely* here mentioned, was not a Judg in this Case between the two Earls, but joyned in Commission with others, who were empowered to summon a Jury to enquire of the matter of Fact, not to condemn either Party, but was only in the nature of an Inquest, or Grand-Jury, in order to a Trial. 2. That Noble-Men [*Magnates*] such as refused to take an Oath, were returned of the Jury. 3. That the Verdict was given in to the Commissioners, notwithstanding some of the Jury were not sworn. 4. That the Jury was summoned out of several Counties, *viz. Glocestershire* and

and *Wales*. Laſtly, and that for which I have chiefly produced it, that this Submiſſion of both Parties to the King was no waver of their Peerage. Neither doth it appear, that this Award made by the King with the Conſent of thoſe Prelates, Earls, &c. was made in Parliament, tho it be *inter Placita Parliamentaria*, but only by ſuch private Counſellours as the King thought fit to make uſe of in that Affair. That it was no Parliamentary Judgment, is evident from theſe two Reaſons: Firſt, The putting themſelves to the Reference of the King, was no putting themſelves upon any Trial by their Peers, becauſe that ſhould have been done only by the Earl of *Gloſter*, againſt whom the Bill was found; whereas here the Reference is made by both, (*b*) and to the King alone. Next we find the King here was preſent with the reſt, which was not uſual; if the Lords had proceeded judicially wherever the matter was heard, whether in Parliament, or elſe-where. Beſides, it is obſervable that the word *Conſilium*, is twice written with an [ſ]; whereas, if it had been a Parliament, the word would have been written with a [c], as was generally obſerved by the Writers of thoſe Times. In Concluſion, this Record makes nothing either to the Biſhops Power of judging in Criminal Caſes, or that Submiſſion of a matter to the King ſhould be a waver of Peerage, but was a making the King an Arbitrator,

(*b*) *The reaſon I conceive why the Reference to the King, was made by them both, was becauſe no Proceedings could be in Parliament, in regard the Verdict was not returned upon Oath, and ſo in it ſelf null.*

for they knew the Verdict was void, being not upon Oath.

I have before denied that ſuch Perſons as ſate in the Lord's Houſe by virtue of their Office, had any Right to be tried by Noble-Men, except they had an inheritable Right of their own, as well as their Office. I am not therefore concerned to examine as to Predial Feudal, or Perſonal Right, what is urged by our Author, or any other, becauſe I have throughout this Diſcourſe, maintained that no Man can have any Priviledg, or Right of Trial, but according to the nature of his Peerage, which ſeems to me, not only reaſonable, but within the plain meaning of *Magna Charta*: that the Triers and Party tried, ought to be of the ſame Condition, and capable to undergo the ſame Penalties in like Caſe. That what the Diſcourſer hath ſaid as to the Regradation of their Peerage when their Office ſhall be taken away, means no more, than that Officers ſhall no longer ſit among the Peers, not that they had any Right of Peerage during the continuance thereof, tho they were placed among them by a particular Law, or Uſage. Neither is our Author's Reaſon of any force, that becauſe Perſons enobled in Blood in a Forreign Country, ſhall not try a Peer of *England*; therefore the Parity is not of Blood, but of Priviledg in Parliament: For he cannot but know that all Laws are originally made for the benefit of

Diſc. of Peerage, p. 4. *Gr. Qu.* p. 132.

Gr. Qu. p. 134.

of thoſe who are born ſubject to them, or adopted into them by Naturalization, and ſuch ſhall have the full benefit of all things appliable to their *Engliſh* Condition, as if they were natural born-Subjects. Others that are Strangers, tho of equal, or greater Quality, ſhall not enjoy the Rights inveſted in the Natives by their Birth, but only the Protection, and Priviledge of the Laws of that Country where they are, during their abode there.

Another Argument is drawn by our Author from the Proceedings in Caſes of Appeal againſt a Noble-Man at the Suit of the Party: He argues thus. If in Appeal of Murther, or the like, at the ſuit of the Party, a Noble-Man ſhall be tried by a Jury of good Free-holders, then their Exemption from being always ſo tried, proceeds from their ſitting in Parliament, and not from Nobility of Blood, and therefore all thoſe who have Right to ſit in that Houſe, have Right to the ſame Priviledg: But the Biſhops have Right to ſit in the ſame Houſe, and are called Barons, therefore they ought to enjoy the ſame Priviledge other Barons have.

This Argument, how ſpecious ſoever it may appear, is unconcluſive in many reſpects. Firſt, It doth not follow, that thoſe that have Priviledg to ſit in the ſame Houſe, have the ſame Priviledges to all Intents, and Purpoſes. My Lords the Judges, and all Juſtices of the Peace, ſit

upon the ſame Bench, and by the ſame Commiſſion, yet are not equal in all Circumſtances. Nay, my Lords the Biſhops themſelves, though they are of the ſame Order and Quality, yet are not equal in Priviledges. I have before ſhewed that there were *Barones Minores*, who were not properly Barons, but ſo called, and might be left out at the King's Pleaſure: But ſuch as are enobled in Blood may demand their Writs, which the *Barones Minores* could not. And if now the Biſhops have that Right (which is not certain) it is becauſe they are to ſummon the Clergy, without which the Parliament would not be compleat as to the Convocation. And were it not for that Reaſon, the Biſhops might be now wholly left out, for they being only Barons by Tenure, cannot be in any other Rank than were the *Barones Minores*, who were left out at the King's Pleaſure. I have before aſſerted, they hold their Poſſeſſions, *per Servitium Baroniæ*, as a Burthen, not Honour to them; and their ſitting among the Lords was only indulged to the Dignity of their Function as Biſhops, they being indeed no more than Commoners. Neither ſecondly, doth it any way follow, that becauſe Peers in ſome Caſes ſhall be tried by a Common Jury, therefore thoſe who are properly Commoners, and only priviledged to ſit among the Lords, ſhould participate of the ſame Honour with them.

To

To examine farther into the Reaſon, why in all Criminal Caſes at the Suit of the King, the Trial ſhall be by Peers, not ſo in an Appeal for the ſame Crime, Sir *Edw. Coke* will tell you, One reaſon is becauſe the Trial, if it ought to be ſo, muſt be before a Lord Steward, and no Appeal can be brought before a Lord Steward, who is but only Temporary, but ought to be brought before the Judges in the King's ordinary Courts of Juſtice. We are likewiſe further to conſider, that Inequality of Perſons, is not of the Law of Nature, but of Human Conſtitution; and that the Statute of *Magna Charta*, is but a Confirmation of our ancient Rights, in which all Subjects were *Pares*. But ſince it is apparent, that ever ſince *Magna Charta*, and perhaps long before, the Trials at the Suit of the Party have been as they now are: we muſt look upon them as a Branch of the common Law of *England*, never taken away from the Commoners; but that the King, and Noble-Men, as to what concerned the Crown, were contented to introduce that manner of Trial as to the Nobles, and long uſe and Cuſtom hath now made it to be received as the Law of *England*; yet the poor Commoner never received that way of Trial as to his own Right, who look'd upon the Verdict of twelve ſubſtantial Men of his Neighbourhood, as much better Security for them and their Heirs, than a Trial upon Honour: When upon their Appeal

it would always have been in the Power of the King to name again the ſame Lords for Triers, which they had before, and by that means defeat them of the benefit of their Appeal, to which the Law gives ſo great reſpect, that upon an Appeal brought, all Proceedings at the King's Suit ſhould (as has been taken for Law) ſtay till the Appeal were determined, becauſe a particular wrong to a private Perſon in the Murther of an Husband, or very near Relation, is of greater Conſideration to the Party, than the general loſs of a Subject is to the King.

Gr. Ly. p. 135. I ſhall not purſue this Author in his Digreſſion touching the ground, and reaſon of the Trial by Peers, ſince our Queſtion is not, what the Law may be in other Countries; but what the Practice of our own is, and of what ſort of People thoſe Peers are to be compoſed. That is to ſay, Whether the Jury for the Trial of Biſhops ſhall be compoſed of Noble-Men, or of Commoners? In this he confeſſeth that

Gr Ly. p. 14. the Lawyers, and thoſe of them who have moſt ſearched into Antiquity, are of a different Opinion to what he maintains as to this Particular. A ſhrewd Objection I take it this is! for every one ought to be credited in his own Art, and 'tis ten to one the Generality of the Lawyers are rather in the right, than Strangers to the Profeſſion, or Lawyers of a lower Rank, than thoſe great Maſters have been. But

that

that he may ſay ſomething, he tells you that Mr. *Selden* not only in that confuſed *Rapſody* goes under his name, but in his more elaborate ſecond Edition of his Titles of Honour, admits the Biſhops to be Peers, in which he hath corrected, and left out the falſe or doubtful Paſſages of his firſt Edition, and among the reſt, that Paſſage; A Biſhop ſhall not be tried by Peers in Capital Crimes. What then? doth this Omiſſion ſuperſede thoſe Precedents laid down by him in that *Rapſody*, as he calls it, which was as much his as the other? The leaving out that Paſſage might be a Neglect in the Printer: I am ſure, 'tis no Retractation of what he had ſaid before. Neither need I tell this Author, how Books come ſometimes to be corrupted. Secondly, He ſaith, ſome things have been affirmed about this matter with as great Aſſurance as this is, which have not been the conſtant Practice; *Coke*, he ſaith, is poſitive in his third *Inſtit.* p. 30. That a Biſhop ſhould not be tried by Peers, and in the ſame Page, that a Noble-Man cannot wave his Trial by his Peers, and put himſelf upon the Trial of the Country. And doth this Author think the Law to be otherwiſe? Yes, he ſaith in the Record of 4 *Edw.* 3. That *Thomas* Lord *Berkley* put himſelf upon his Country.

Gr. Qu. p. 142.

Gr. Qu. p. 143.

Cook 3 Inſt p. 30.

I have a Tranſcript of the Record by me, which I received from my learned and worthy Friend, Mr. *Atwood* of *Greys-Inn*;

but becauſe it is in Latine, and agrees with the Abridgment by Sir *Robert Cotton*, and reviewed by Mr. *Prin*, I ſhall not tranſcribe except two or three Lines.

4 E 3. N. 16, 17. *Thomas de Berkele Miles venit coram Domino Rege in pleno Parliamento ſuo*, &c.

Cotton 4 *E.* 3. *Numb.* 16, 17. In a Plea of the Crown holden before the King this Parliament. *Thomas* of *Berkley* Knight, was arraigned for the Death of *Edw.* II. for that the ſaid King was committed to the keeping of the ſaid *Thomas*, and *John Mautrevers* at the Caſtle of *Thomas* at *Berkley* in *Gloceſterſhire*, where he was murthered.

Thomas pleads that he was ſick at *Beudley* without the ſaid Caſtle, at the Death of the ſaid King, and put himſelf upon the Trial of 12 *Knights*, (named in the Record) by whom he was acquitted. Here we have an Arraignment of *Thomas de Berkele* Knight in 4 *Edw.* 3. but none of *Thomas* Lord *Berkele* as this Author ſuppoſeth. In 5 *Edw.* 3. *Numb.* 15. I find the ſame Perſon at the requeſt of the whole Eſtate, diſcharged by the name of Sir *Thomas Berkley*; ſo that it ſeems plain, he was then no Peer, and conſequently no waver of Peerage, in 14 *Edw.* 3. and in 4 *Rich.* 2. *Cot.* p. 187. I find him ſummoned to Parliament, not before 14 *Edw.* 3.

Militer.

5 E. 3. N. 15. Cotton.

When any Noble Man had the Addition of *Miles*, the name of his Barony, was generally expreſſed; and the word *Dominus* annexed, *John de Beauchamp Militi Domino de*

de Beauchamp 27 *Hen.* 6. *Rob. de Hungerford Mil. Dom. de Moleyns*, and many others; Inſomuch that I am confident, that in 4 *E.*3. *Thomas de Berkley* had never been ſummoned, and ſo not *inter Barones Majores*. And the *Milites* were Tenants *in Capite*.

I have at laſt examined all the parts of this elaborate Treatiſe, in which the Author hath endeavoured with all Art and Induſtry imaginable, to ſupport a declining Cauſe. I have not to my Knowledg, left any Argument unconſidered, which hath been thought material by this Writer to be urged in defence of that Cauſe, the Maintenance whereof he had undertaken. I have been longer I confeſs, in this Diſcourſe than at firſt I thought to have been, but this muſt be attributed to the Subtilty of my Adverſary, who by learned Digreſſions, and cunning Inſinuations, hath indeed clouded the Truth, and rendered it leſs viſible to the Eyes of common Readers.

Notwithſtanding, what I have ſaid, if this Drudgery of being preſent as Judges in Criminal Caſes, or in the Trials of Noble-Men in Parliament, be the Right of the Lords Spiritual in Parliament: If the Embaſſadours of Chriſt, the Meſſengers of Peace, and the Preachers of Mercy and Reconciliation to God in Chriſt, have more mind to be Executioners of God's ſtrange Work, than in what he delights? If they delight rather to make Wounds, than to bind them up, let them enjoy that Burthen according

according to their Deſire. But their Pretences to it hitherto, have been ineffectual, and of late, all Power of Judicature in Caſes of Blood, hath been denied them in ſeveral Parliaments by both Houſes. Neither hath this Author been yet ſo happy, as to have produced any one clear Precedent, where they have been preſent at the Trial, and have given Votes for the acquittal, or Condemnation of any Noble-Man brought to Judgment in Parliament in Caſes of Blood: Or that any of their Order have been in ſuch Caſes tried by Noble-Men, or indeed have deſired to be ſo tried.

Certainly this Nation, together with the moſt of other Chriſtians in *Europe*, lived under the Papal Communion till the times of Reformation; and therefore the Biſhops here cannot reaſonably be ſuppoſed to have enjoyed Priviledges different, or greater than thoſe enjoyed by their Fellows in other Places, where they had the greateſt, as well Power, as Honour. But I think I may with Confidence affirm they were no where allowed to ſit Inquiſitors of Blood, and not only to debate, but at their Pleaſure to give Sentence in ſuch Caſes as Secular Perſons in Secular Courts. I very well remember that in the Parliament begun here, 1640, it was at the beginning thereof hotly debated in the Lords Houſe, whether any Biſhop might be ſo much as of a Committee in any Parliamentary Exami-

Examination in the Caſe of my Lord *Straf-ford*, becauſe it was a Caſe of Blood, in which, by Law they ought not to meddle; the Debate was put off; and the Biſhops were willing to abſent themſelves according to the Opinion of one of their own Body, and agreeable to the Practice and Uſage of the Kingdom, being only allowed by the Lords to enter a Proteſtation, ſaving their Rights in that, and other Caſes. Now this very Queſtion ſeems to me an overruling ours: for if it were then a Queſtion whether they might be of a Committee in Caſes of Blood, where the Judges were often joyned with the Lords, it can be no doubt, but that they ought not to be admitted to give their Votes as Judges in the like Caſes in their Perſons.

REFLEC-

REFLECTIONS

UPON

Antidotum Britannicum,

AND

Mr. *Hunt*'s late Book and Poſt-ſcript,

As far as concerns the Controverſy between Doctor *Brady* and the Author of *Jani Anglorum facies nova*, and of *Jus Anglorum ab Antiquo*.

London, Printed *Anno* 1682.

CHAP. I.

The true and eſſential Difference between the General Council *of the Kingdom, and the* Curia Regis, *maintained againſt Dr.* Brady, *Mr. W. and Mr.* Hunt; *with a ſhort Account of ſome Reaſons why Mr.* Hunt *might have ſpared his Cenſures upon them, who apply themſelves to the Study of Antiquities.*

SInce Dr. *Brady* received a Reply, two of my Brethren of the Gown, Mr. *W.* and Mr. *Hunt*, both of *Greys-Inn*, have appeared in print, in behalf of the King's *Tenants in Capite*, and will needs have it that theſe ingroſt the Right of coming to Parliament, as one calls it, or the Magnum Concilium, as the other, till 49 of *Hen.* 3.

One profeſſes that he never read what has been wrote upon this Subject either by Mr. *Petyt* or me. *Antid. Britan.* p. 56.

The other ſlights it all, as a Diſpute not worth the Coſt and Pains ſpent about it; and grants many of Dr. *Brady*'s *Hypotheſes*, but denies his Conſequences, and ſo allows him to be a good Antiquary, but an ill Logician. *Mr.* Hunt, *p.* 156.

That

That there was a **Curia Regis**, or *Common Council of the Tenants in Chief* (such especially as held of the King by *Knights Service*) distinct from the *Great Council* of the Nation, or *Parliament*: In which **Curia**, the King's Tenants granted to the King *Auxilia*, Aids, and did act many things in relation to their Tenures: Both agree with me directly against Dr. *Brady*, who will have it, that all *the King's Tenants by Knights Service* never met in any *Council* or *Court*, but thereby it became the **General Council** of the Nation, or **Parliament**.

Hunt, p. 133. & 166.

Dr. Brady against Jani Angl. &c. p. 26. c. 29.

In which, since he is opposed by these two learned Authors, agreeing with me, they have given so much Credit to my Notion, that they have prevented that further trouble, which I might have given the inquisitive World upon that point.

If I can free my self from the force of these Gentlemens Arguments, or Objections upon those things wherein I differ from them, I think I need not fear the empty Thunder of Men of other Professions; but may look upon my Notions as sufficiently established.

Both Mr. *W.* and Mr. *Hunt*, are Men of much longer standing, and greater natural and acquired Parts, then I can pretend to; yet if I have the good fortune to fall into the Paths of ancient Truth, no modern Authorities ought to beat me out of them. They both will have it, that the *Tenants in Chief* were the only Members of the **Curia Regis**,

Regis, which was held for Matters within the King's ordinary Power, and of the Magnum Concilium, or *Parliament*, where the extraordinary Power was exercised: Against them both, before I examine their supposed grounds from Authority, this obvious Objection in reason may be urged.

If all the *Tenants in Capite by Knights Service*, were obliged to attend in the *Curia*, either by virtue of their Tenure as (*a*) one takes it, or of general summons, as the (*b*) other, and the consent of none but such Tenants were requisite for passing of Laws in *Parliament*, what reason can be assigned, why Laws might not have been made in the Curia, and so that have become a *Parliament* when ever the King pleased to declare it so? Can a more particular Summons, and notice of Arduous Affairs, which is Mr. *Hunt*'s Notion, lay a greater Obligation upon them to be present, who, however, were bound to come? And if they were bound to come, can Absence be reasonably pleaded to free any from the Obligation of what was then agreed on? Indeed Dr. *Brady*, who will have it that every full Confluence of the *Tenants in Chief* by Knights Service to Counsel, was a General Council of the Nation; supposes that even before King

(*a*) *Ant. Brit.* P. 59.

(*b*) Mr Hunt, *p.* 148.

Mr. Hunt, *p.* 150.

The King's ordinary setled not established Court, was a different thing from the Confluence of Barons and Tenants in Capite: *at those three great Feasts, which were fit and appointed times for great and General Councils if there were an Appearance sufficient.* Brady *against* Jani Anglorum, &c. *pag.* 30.

John's Charter, and while he thinks that they were to come to *Parliament* et Ponr, without Summons, if but a few appeared, it was no General Council: which is an abſurd Suppoſal, unleſs there was before that a Law in being, that they ſhould not act without a certain number, as ſuppoſing that forty were to make a full Houſe, as now 'tis ſaid to be with the Commons; for otherwiſe they who did appear, did, according to the general Rule of making Laws, bind them who were abſent through their own default.

But if we conſider how contrary it was to the Uſage of thoſe Times, to make Laws, or inſert Clauſes, or Words, idle or unneceſſary, we ſhall not eaſily believe that they would, according to Mr. *Hume*'s Suppoſal, have made Proviſion for the particular ſummoning of thoſe for *arduous Affairs*, who were obliged to attend at the *Council* without ſuch Summons. Indeed I am aware that Dr. *Brady* hath charged me with putting ſuch a ſenſe upon *King John's Charter*, as would imply a needleſs Proviſion.

The Doctor tells us that by *King John's Charter* the Cauſe of Summons was to be expreſt, and from thence he would infer that it was a Great Council there intended; for, ſaith he, ſuch Proviſion *were needleſs if there had been but one Cauſe for which they were to be ſummoned*, which he urges as the Conſequence of my interpreting that Summons there provided for,

Dr Brady againſt Jani Angl. p. 30.

for, to have been only for raiſing ſuch Aids in the Curia as could be impoſed upon the King's immediate Tenants; and none elſe. Now admit that this had been to a *Parliament*, and had taken in all manner of Charges to be laid upon the Subject, if the raiſing of *Taxes* were the only work of a *Parliament*, the providing that they ſhould have notice when a *Tax* had been required, would have been as impertinent; and if the *Parliament* had any other Power, this Proviſion had been as defective as he ſuppoſes 'twas, according to my rendring, ſuperfluous.

For that Summons mentioned in *King John's Charter*, is reſtrained, and limited to the granting of *Aids*, but there is not one word, or ſyllable of making, or enacting Laws, which is the main buſineſs of *Parliaments*, and therefore this muſt be intended of ſome Inferiour Counſel, and not of the *General Council* of the Kingdom. But if the *Charter* be taken to be meant only of raiſing ſuch *Aids* as lay upon none but the *King's Tenants*, if thoſe *Aids* branch themſelves into Eſcuage and Tallage, here were two Cauſes of Summons, as the one or the other was required; or if only ſuch *Aid* as Eſcuage was within the Proviſion, ſtill the Cauſe or the Occaſion of raiſing the Eſcuage might be different; and therefore the cauſe of Summons more than one; nay ſome might have been obliged to attend upon one Cauſe of Summons expreſt,

which were not upon another; for if the King had an Occaſion of tranſporting an Army beyond Sea; in that caſe only they that held by the Service of going into foreign Parts, together with ſuch as were tied to general Service, were obliged to attend, and liable to pay Eſcuage, upon their default, to be taxed by *them who were preſent* accordiug to the Obligation of their Tenure. If the Tenure were to go into *Scotland* or *Wales*, they could not, by reaſon of their Tenure, be compelled to go elſe-where, whereas the Attendance at *the King's Court* ex more, was what, I take it, lay upon every *Tenant in Chief*, holding by Knights Service, Ratione Tenuræ, and was not ſuperſeded by *King John's Charter*, but ſtill they that were not preſent, were concluded, as to all Acts of *the King's Court Baron*, either in Criminal, or Civil Cauſes; as much as in the Court-Baron of an Inferiour Lord, the Suitors preſent may proceed to all Judgments within the Cognizance of their reſpective Courts, where, through the common neglect of the *Suitors*, the *Steward* for the moſt part gives Judgment by himſelf.

Vid. 1. *Inſtit.* f. 69: *b*:

Eſcuage neſt. q. penalty pur non ſeſans de Service de Chivaler, Bruertons *c.* 6. *Rep. f.* 2. *a.*

Mr. *W.* who was the firſt Author of a Lawyer that ran Counter to me, makes a diſtinction between a *Parliament* and a Curia Regis, which I conceive to be without any difference in Relation to the ſeveral Powers of the Curia, and the Great Council of the Natjon, except that 'twas leſs in that

that which is now called the *Parliament*, than 'twas in the Curia; for he ſays that to the Curia the Tenants were obliged to come Ratione Tenuræ, but to the other they could not come but ex Gratia Regis. Ant. Brit. p. 59

Upon which 'tis further *obſervable*:

1ſt, That he yields that the *Commons*, others beſide the *Tenants in Chief*, had as much right as the *Tenants in Chief* to come to the Parliament before the 49th *Hen.* 3. for he grants that they too came ſometimes before that time ex Gratia. Ibid. p. 57.

2dly, Whereas he ſuppoſes that *King John's Charter of Reſignation* was void, not being in Magno Concilio, though 'twas in Communi Concilio Baronum, he aſſignes no reaſon in the World for it's being void; for admit that, to the Commune Concilium Baronum, or Curia, the *Tenants in Capite* came Ratione Tenuræ, and to the General Council of the Kingdom ex Gratia, which he ſubjoyns as the Ground for avoiding that ignominious Reſignation, which he agrees with me, contrary to Dr. *Brady*, to have been made in the Curia Regis, and not in the General Council of the Kingdom; does it follow that becauſe they had no Right to come to the General Council, though they had to the Curia, that therefore a Reſignation in the Curia was not good? nay, does it not follow, that becauſe they had no Right to come to the General Council, therefore the King might exerciſe Ant. Brit. p. 59

his absolute Power in such a Counsel as he should think fit to call, and might oblige the Nation in any Act of his done by such Advice or Consent?

Nay rather, if there were a *Counsel* where they might or ought be present, which Mr. *W.* makes the same with *Ratione Tenuræ*, does it not follow that there would be less Obligation upon them from any Act done in the General Council of the Kingdom, where they had no Right to be present, and so no consent of theirs could be urged to inforce the Obligation, than from the Determinations of that Counsel where they were *necessary Members?* But Mr. *W.* his Grounds for his Belief that the *Commons* had no Right to come to the General Council of the Kingdom before the 49th of *Hen.* 3. are two.

Ants Eriz. p. 57. 1*st*, That in the 45*th* of *Hen.* 3. *only three were ordered to be Representatives for every County*, the Year I take to have been mistaken by the Printer; for the Settlement, and Reformation of the Government which he mentions, was in the 48*th*; and that he means that Settlement, and not one before in the 42*d*, is evident, by his citing Si videatur Communitati Prælatorum et Baronum, which is in the Record of the 48*th*, and not in any of the 42*d*, that I have seen.

Rot. Pat. 48. H. 3. *infra* p. 30. But 'tis evident by the Record that the three he mentions, were assigned for the Electors of a *standing Counsel* to the King, which was to act out of *Parliament* as well as

as in, but with no Authority in Legiſlation; beſides, admit that they were intruſted with all the Power of the Counties, I cannot find any force in the *Argument*, that becauſe a Repreſentative was then agreed on, therefore they had no Right to come before that time in their own Perſons. But indeed in the 42*d* of that King, there was a Repreſentive of the Commons, who were in thoſe times accounted only the *Citizens* and *Burgeſſes*; this was *pur eſpargner les Coſts des Communs*; to ſpare the Charges of the Commons, which I uſe not to ſhew that all ſuch came any otherwiſe than two for a place; But that the ſettling a Repreſentative is an Argument, that before that time they came in greater Numbers.

Rot. Par. 42. H 3. *The Original Record is not now to be found, but I have ſeen an Abridgment of it, done by Mr.* Selden.

Mr W. his ſecond Argumnt conſidered.

2*dly*. His ſecond Argument is the Authority of *Pollidore Virgil*, which proves wholly againſt him; for it ſays that the Populus rarely were conſulted with before the time of *Hen.* I. Adeo ut ab Henrico primo id Inſtitutum Jure Panaſſe dici poſſit.

Pol. Vir. *lib.* 11. *fol.* 188. 16 H. 1.

Even he allows the Right of the *Commons* to be a conſtituent part of Parliament, to have been an Inſtitution, or a *ſettled Right* long before the 49*th* of *Hen.* 3. no leſs than one hundred forty nine Years. And in the Caſe of *Godſoll*, and others againſt Sir *Chriſtopher Heydon*, my Lord *Cook* affirmed that he had ſeen a Record in the time of *Hen.* I. of the Commons Degrees, and Seats in Parliament, his words are theſe,

1 Rolls fol. 41. *En Ancient temps tout le Parliament sea insimul, & le Separation fuit* Par le desire del Commons mes nient obstant ils font forsq; un mese, *ito aie veiw un Record* 30 H. 1. *de lour Degrees, & Seats.*

That the Commons were Members of the General Councils of the Kingdom in the time of *Hen.* I, I think is very plain, when we find even at Synods, Assemblies for Ecclesiastical Affairs, Nobilitas Populusq; minor, and Laici tam divites, quam mediocres. But that they then had any Order, and certain Seats there, I cannot readily believe. And indeed we find that in the Reign of King *Stephen*, who immediately succeed *Hen.* I. 'tis spoke of as customary for the Vulgus, or Commons, which were Infinita Multitudo Plebis, to come as Members of the *Great Council*, and to intermix themselves with Men of the greatest Quality, as 'tis usual in Crouds; Vulgo *etiam confusè & permixtum*, ut solet *se ingerente.*

Ead. *lib.* 3. f. 58.

Spelm. Conc. vol. 2. f. 35.

Cron. Eliense. Vid. *Jus Angl.* p. 211.

Hist. Norm. gest. a *Stepho* Rege *f.* 931.

3*dly.* Mr. *W.* his third Argument is, that *where a Record makes mention of Archbishops, Bishops, Abbots, Priors, Barons,* and all the Commonalty of the Kingdom or Land, &c. *It doth not from hence necessarily follow, that the Commons were then present, for the word* And *may be taken exegetically, and expositive, and not introductive of any other Persons*; and the *word* Communitas, *doth many times extend to the Prelates, and Barons, therefore* it

Antid. Brit. p. 59.

Mr. W. his third Argument fully answered.

Anti. Brit. p. 59.

it is said, Si vibratur Communitati Prælatorum & Baronum. Here lies the force of all the Cavils upon the Records, mentioning others besides *Tenants in Capite*, and Mr. *Hunt* insists upon the same in effect, with the very same Instance. I shall here chiefly apply my self to Mr. *W.* and I cannot but observe, that what I have here cited out of his Book, either contains an Assertion without any manner of Proof offered, or else the latter part is used for the Proof of the other; but surely 'tis an odd kind of Proof that And may be used *exegetically*, because the word Communitas may extend to several Particulars, and as well to *Prelates*, and *Barons* as *others*, when particularly expresst along with it, which is no more than that the other words are *exegetical*, or *expositive* of Communitas, not that Communitas, or And joyned with it, can be *expositive* of those other words.

Wherefore the Assertion that And may be used *exegetically* stands naked by it self, without any colourable Cover or Support; and I would gladly see at least some Colour for the Belief, that the *Conjunction* And, was ever used as *expositive*, or *exegetical* of any word or words foregoing; Indeed when 'tis *Husband* and *Wife*, they may notionally be the same in Affections and Desires, and become one Flesh, as Body and Soul make one Man: But I think no Man will say that the Wife is exegetical of the Husband, and is no more than what was mentioned before when

This the Hinge of the Controversy as to the Fact; Whether the Commons of England were introduced into Parliament, or had any Share or Votes in making of Laws for the Government of the Kingdom, or had any Communication in Affairs of State, otherwise than as represented by the Tenants in Capite, before the 49th of Hen. 3. vid. Dr. Brady against Mr. Petyt, p. 1, 2.

when the Husband was named, nor will any but ſuch as believe the Mortality of the Soul, and that 'tis nothing elſe but the Temperament of the Body, or its animal Spirits, ſuppoſe the Soul and Body to be the ſame; indeed if they were, the Body ought to ſtand by it ſelf, without mention of the Soul with a *diſtinctive* And.

Till ſome one Inſtance can be produced, in which Mr. *W.* can make it out to the common reaſon of Mankind, that And ought to be uſed otherwiſe than as *introductive of ſomething not expreſly mentioned before*, he muſt give me leave to think that in the matter of our Diſpute And is *neceſſarily introductive of ſome other Perſons.* But according to the Rule of making And *exegetical*, where 'tis expreſſed in the Inſtance given in the Record 48 *H.* 3. Si vidcatur Communitati Prælatorum & Baronum, Et muſt by plain Conſequence be *exegetical* of the *Prelati*; and ſo the *Barons* were only the Community of, or all, the *Prelates.*

I take it to be obvious that And of it ſelf can never be *expoſitive*: the queſtion then will be, what may or ought to be the Expoſition of words, which ſingly taken, are of more general, or more reſtrained Senſes, and how far they may or ought to be enlarged or reſtrained, according to their Poſition, or according to the nature of the words which are uſed along with them.

And

And in my Opinion, it is contrary to the Laws of Interpretation, that a word uſed in a general Senſe, and as comprehending others, ſhould explain thoſe others particularly ſet down, as that **Communitas** which here Mr. *W.* would have taken in a general ſenſe, as not confined to one Order, ſhould explain what is meant by *Prelates*, *Peers*, and *Barons*, before particularized: on the other ſide, words of a particular explicit meaning, coming before or after, one of more general import, ſhall explain and reſtrain the general Senſe. Thus *Prælatorum & Baronum*, either before or after **Communitas**, reſtrain that word **Communitas** to the *Community of the Prelates and Barons*; and I dare ſay, no one Record can be ſhewn of the times, either before or after the 49*th* of *Hen.* 3. which will warrant a contrary Expoſition of ſuch Words. And indeed there has no Reaſon been pretended why **Communitas** or **Populus**, joyned to ſome Orders of Men expreſſed, ſhould be the ſame with what went before, but what is a manifeſt begging of the Queſtion, and ſuppoſing that the **Commons** were not preſent in the General Councils at the Times the Records mention, and therefore that the word **Communitas** or **Populus** was ſuperfluous, and referred to what was ſufficiently expreſt before, was *comprehenſive* of the foregoing Particulars, as Mr. *Hunt* will have it: this illogical *Petitio principij* is a Leaden Vein which runs through

Mr. Hunt, *p.* 152.

through all Doctor *Brady*'s Writings.

But let us a little obſerve the pennings of Records, which may give Light to this matter; you ſhall there find words of a reſtrained Senſe, following one of more general, to be *exegetical* or *explanatory* of the general, as the *Peers*, *Earls*, and *Barons*; there *Earls* and *Barons* denote what *Peers* are meant, becauſe there might have been *Bannerets*, an inferiour Order of *Peers*.

Rot. *Parl.* 4. E. 3. *N.* 3. les Piers Counts & Barons.

Then you ſhall find words of a limited Senſe going before to be reſtrictive of a word following, which otherwiſe would have had a more general Senſe, as *Earls* and *Barons* [the *Peers*] there the *Earls* and *Barons* are the only *Peers*: But where 'tis *Earls*, *Barons* and *Peers*, there neither the firſt nor the laſt words can be *expoſitive*, becauſe And ſevers them, and conſequently makes them to be of different Senſes; wherefore And is *neceſſarily introductive of other Perſons*; and the word *Peers*, which without And might have been a *Genus* to the ſeveral Species of *Earls* and *Barons*, muſt needs be an Inferiour *Species* under a *Genus* not there mentioned. But ſtill *Peers* could not have explained the *Earls* and *Barons*, but *Earls* and *Barons* would be *expoſitive* of *Peers*, which is more comprehenſive in its Signification.

Counts & Barons les Piers, 4 *E.* 2. *Rot. Parl.*

And thus where 'tis **Communitas Prælatorum & Baronum**, **Communitas** is the *Genus* to theſe two *Species*, and the more particular words reſtrain the **Communitas** to

to them; wherefore 'tis the whole Body of the *Prelates* and *Barons*, and none elſe; but where it is *Prælati*, *Comites*, *Barones*, & Populus, or & Communitas, there the Populus or Communitas muſt be inferiour to the reſt particularly mentioned, being there is a deſcent from the higher Orders ſtill to the lower; if they begin at the bottom, they end with the higheſt, at leaſt that which is added at the laſt, muſt be ſomething diſtinct, or different from, or not paticularly expreſt in what went before, which is enough for my purpoſe. I ſhall cloſe this with a few more Examples out of Records. In a General Council of the Kingdom held in the fifth Year of *King John's Reign*, after he had married his ſecond Wife, having been divorced from the firſt: the new Queen was ſolemnly crowned, *unanimi conſenſu & concordi Voluntate Archiepiſcoporum, Epiſcoporum, Comitum Baronum, Cleri*, et Populi totius Regni. *Magna Charta* was confirmed in a General Council of the Kingdom, 9 *H.* 3. 39 Years before the 49*th* of that King per Common aſſent tout de le Reaum; and this in another Record, is ſaid to be Per le Roy, Piers & Commune de la terre.

Rot. Cart. 5. Jo. m. 5. n. 33.

Rot. Pat. 25. E. 1. n. 38.

Rot. Parl. 15 E. 3. n. 50. d.

And the Statute of *Weſtminſter* the firſt, eleven Years after 49. *H.* 3. was ordained *per l'aſſentments de Archieveſques, Evesques, Abbes, Priors, Countes, Barons*, Et tout la Comminalty de la terre illonques Summonees.

Sta. Weſtm. 1. 3 E. 1. 1. *Juſt.* 156.

Now

Now what Man of common Sense can believe that the Clerus & Populus totius Regni, after the *Comites, & Barones* 5 *Jo.* the Commune de la terre, after the *Peers*, 9. *Hen.* 3. and tout le Comminalty de la terre, after Countees and Barons, 3 *Edw.* 1. were no more than the *Prelates, Earls* and *Baront*; indeed there being no Et between *Baronum* and *Clerí*, 5 *Jo.* were it not for other Records explanatory of the like, there might be some Colour for Mr. *Hunt*'s supposal that Clerí & Populi were only *comprehensive* of the Orders foregoing, and might be in the same sense with Communitas *Archiepiscoporum, Episcoporum, Comitum, & Baronum.* But for the penning of Records, both Mr. *Hunt* and Mr. *W.* know better, than to think the Clerks in those times stuffed them with Tautologies. Mr. *Hunt*'s way of expressing the same Notion, I shall soon consider more particularly.

But admit that my Interpretation of Records is generally erroneous; yet 'tis manifest that the Record which is cited and insisted on to warrant the contrary, shews that there were other Persons at the General Council of the Kingdom besides *Prelates, Earls* and *Barons*, and that these were such as are now called Commons.

The Record was the form of Peace agreed on in the 48*th* Year of *Hen.* 3. it says.

Hæc

Hæc eſt forma Pacis à Domino Rege, & Domino Edwardo filio ſuo, Prælatis & Proceribus omnibus, & Communitate Regni Angliæ, communiter & concorditer approbata, &c.

Rot. Pat. 48 H. 3. pars unica *m.* 8. *d.*

Amongſt other things 'twas agreed, *ad Reformationem Statûs Regni Angliæ*, that there ſhould be choſe in that *Parliament* three Men, who ſhould have Power from the King to name nine, that ſhould be the King's ſtanding Counſel; and if any of the three diſpleaſed the Community of the Prelates and Barons, or were by them thought unfitting for their Office; **Si videatur Communitati Prælatorum & Baronum**, one or more ſhould be placed in his or their Room, **per Concilium Communitatis Prælatorum & Baronum**; and the Record concludes, *Hæc autem ordinatio facta fuit apud London de Conſenſu Voluntate & Præcepto Domini Regis necnon Prælatorum, Baronum*, **acetiam Communitatis tunc ibi præſentium.**

Rot. Pat. 48 H. 3. pars unica in 8. *m.* 10.

Vid. Jan. Angl. facies nova *p.* 246.

Upon this 'tis obſervable:

1. That **et Communitas Regni**, in the beginning of the Record, next after the *Prælates* and *all the Peers*, muſt neceſſarily be the **Commons** of *England*, nor can **Et** poſſibly be taken otherwiſe than as *introductive of other Perſons* beſides the *Prelates* and *all the Peers*, before expreſly mentioned; for that the Record concludes, as it were with an Intention of preventing all manner of *expoſitive* Cavils; for, having declared that the Ordinance then made, was by the *Conſent, Will, and Authority of the King* necnon,

nemon, *and as well of the Prelates and Barons*; it adds, Ac etiam Communitatis tunc ibi presentium, which must *necessarily* be, and also of the Commons then and there present, as well as the *Prelates* and *Barons* [presentium] being taking as relating to all that went before; or and also *of the Community of them that were then and there present*, that is, *all that were present were Parties to the Ordinance*; if the first, then the Commons also were there by name; if the second, tho Communitas be not taken as an Appellative for the *Commons of England*, yet that they were *then and there present*, is as evident from the Record, since it shews that others were present besides the *King*, *Prelates*, and *all the Peers*, that those others were Parties to the Ordinance then made, and as they could not possibly be of an higher Rank, than what were before expreſt, but much less the same, being so manifestly distinguished with an and alſo, from what went before, they must needs have been inferiour, that is, Commoners, unless there was another Rank of Men, that were neither *Lords* nor *Commons*, but between both: wherefore 'tis a demonstration that there was then present and acting in a Legislative Capacity, a Body of Commons, over and above, or distinct from the *Prelates* and *all the Peers* or *Barons*, above mentioned.

2. In

2. In this Parliament 48 *H.* 3. there was a particular matter referred by the King, and that in a *full Parliament* of *Prelates*, *Peers*, or *Barons*, **and** also the **Commons**, to the Diſpoſition and Management of the *Prelates* and *Barons* only; and ſurely 'twas no great thing for them to be empowered to remove, or put in Electors of the King's ſtanding Counſel, which was all that was referred to them, without conſulting the **Commons** upon every occaſion. But I cannot diſcern the leaſt Conſequence that becauſe the word **Communitas**, doth many times extend to the *Prelates* and *Barons*, which, as Mr. *W.* rightly obſerves, it doth; that therefore it muſt be limited to them, and extend no further, whatever words come between. And I would thank him that ſhould ſatisfy my reaſon how it is poſſible it ſhould be confin'd to them, when there comes **and**, or **and alſo** to extend it farther.

Both Mr W. and Mr. Hunt *argue this way:* Vid. *Mr.* H. p. 152.

If Mr. *Hunt* had obſerved how diſtinctly all the *Orders of Parliament* are mentioned in this Record, *viz. Prælati & Proceres omnes*, & **Communitas Regni Angliæ**; and again, *Prælati*, *Barones*, ac etiam **Communitas**, and had further obſerved how full and clear the Evidence is, that all of them together referred, or conſented to the King's referring the matter before taken notice of, to the Earls and Barons only, or to the *Community* or *Generality* of them, (from whom another *Community*, the **Communitas Regni Angliæ**

then and there preſent, was ſufficiently diſtinguiſh'd in other parts of the Record) and that that Affair was to be managed *per Conſilium Prælatorum, & Baronum*, he would never have inſiſted upon this as demonſtration that **Communitas Regni Angliæ**, after *Prælati & Proceres omnes*, nay, tho with an *et etiam*, has no other Senſe than *Commune Concilium Regni*, and was *as a comprehenſive Term of thoſe that made it*, or was uſed exegetically, as Mr. *W.* has it. If it had been *Prælati & Proceres, Commune Concilium Regni*, or **Communitas Regni**, there, becauſe there is no diſcretive **and**, or **and alſo**, the latter might be comprehenſive of the former. But whatſoever may be ſaid of the careleſs penning of Records or Hiſtories anciently; yet when there are numbers of Records or Hiſtories expreſſing the Parties preſent at *general Aſſemblies of the Kingdom*, ſome of the like penning with the aforeſaid form of Peace 48 *H.* 3. ſome more expreſs and particular, if poſſible; ſhall all the Clerks of Parliament, and learned Monks, or other old Authors be taxed with heedleſs Impertinencies, nay even want of underſtanding what they wrote?

Mr. Hunt, *p.* 152.

Eadmerus, who was a very correct Writer, and lived in the time of which he wrote, tells us, that at one General Convention, in the Reign of *Hen.* I. there were *tota Nobilitas* **cum Populi numeroſitate**; at another, tho it was held only for Eccleſiſtical Affairs, there were **Nobilitas, Populuſq; minor**.

Eadmerus, *f.* 49.

Vid. *Jan. Angl. facies nova*, p. 214. *ad. f.* 58.

The

The Election of King *Stephen*, as a grave Prior of those Times tells us, was *a primoribus Regni, cum favore Cleri & Populi, Clericorum, & Laicorum universitate.* Richard Hagustaldensis, f. 312.

In that King's Reign there was **adunatum Concilium Cleri & Populi**, *a General Council of the Clergy and Laity* together, which now one would say were a *Parliament* and Convocation united; the Members of this Council follow, *Episcoporum, atq; Abbatum, Monachorum, & Clericorum, Plebisq; infinita multitudo*; the Authority for this is a Legier Book of the Abby of *Ely*, wrote as it should seem in the time of *Hen.* I. These kind of Books were generally kept with great Exactness, and were in the nature of Records. From the like Authority we have it that *Archiepiscopi, Episcopi, Comites* **atque alij omnes**, were consenting to the Election of King *John*. Cronicon Eliense. Ex vet. Regist. in Archivis Cant. Arch. Vid. *Jan. Angl.* &c. p. 221.

But to mention a few undoubted Records to this purpose.

In the 15*th* of King *John*, there were Precepts to all the Sheriffs of *England* to summon in every County *Milites*, who were to come with Arms, *Barones* without Arms, and four Knights for every *Shire*, **& quatuor discretos Milites de comitatu**, to a General Council at *Oxford*. *Claus.* 15. Jo. p. 2. m. 7. vid. *Jan.* &c. p. 231.

In the 38*th* of *Hen.* III. besides the *Tenants in Chief*, two **legales & discreti Milites** were required to come for every County, **vice omnium & singulorum**, to be chosen by the *Milites* & **alij de Comitatu**. *Rot. Claus.* 38. H. 3. m 7. c. 2. *Jan. Angl.* &c. p. 245.

Rot. Claus. 21. H. 3. *m.* 7. *d.* And several Records before the 49*th* of *H.* 3. describing the Members of Parliaments, mention besides the Clergy, *Comites, Barones, Milites*, liberi Homines, some, & liberi Tenentes, others, & omnes de Regno.

Magna Charta 9. H. 3.

Now can there be the least colour to believe that all these were no more than the *Prelates* and *great Barons*, or only the *greater* and *less Nobility holding in Chief*, whatever Dr. *Brady* or others may obtrude upon the World?

That the *Commune Concilium Baronum*, may sometimes be used in the same sense with *Commune Consilium Regni*, affords no help to Mr. *Hunt*; because where the expressions are too lax and general, *Barones* shall be taken in it's utmost extent, and consequently shall comprehend *ordinary Free-holders*, who were *Nobiles, & Barones minores* long before the 49*th* of *Hen.* 3. But the Question is, Whether when Records or Histories make a Distinction between *Barones*, and others coming after, the Distinction can be thought to be without any manner of Difference, and so vain and idle, as that the Populus minor, or Populi numerositas after *Nobilitas*, is *a Term comprehensive* of the Nobility before mentioned; or when there were *Primores Regni* cum Clero & Populo the chief of the Kingdom with all the Clergy and People, the word *People*, was but comprehensive of the *Primores*, so that the *Primores* were there together with themselves. But surely

Mr. Hunt *p.* 152.

Vid. Jus Angl. ab antiquo *c.* 8.

Eadm. supra.

Rich. Hagulst.

ſurely I need not run over all theſe Inſtances, and many more produceable to convince even Dr. *Brady*, Mr. *Hunt*, and Mr. *W.* of the abſurdity of interpreting Records after their manner.

But Mr. *W.* thinks to help out his Record by an Hiſtorian, and cites the Additaments to *Matthew Paris*, mentioning the Letter wrote to the Pope in the Caſe of *Adomar de Valens*, which begins thus: *Ant. Brit.* p. 60.

Communitas Procerum, Magnatum, **aliorumq; Regni Angliæ**, and was ſubſcribed by ſome *Earls* and *great Men*, and *Peter de Monteforti* **vice totius Communitatis**; this Mr. *W.* ſays was in the name of the whole *Baronage*, not the Houſe of *Commons*, or *Commonalty* of *England*, there being mention of the *univerſitas Baronagij*, but not *univerſitas Regni Populariſ*. Matth. Paris *Addit.* l. 217.

I take it to be manifeſt that all the Queſtion which can ariſe upon theſe words is not, as Mr. *W.* puts it, whether *Symon Montfort* ſubſcribed in the names of the *Barons* only, or of the *Commons* only: But whether ſome of the great *Barons* having ſet their hands themſelves, *Montfort*, being the laſt Man that ſubſcribed, did not do it in the name of the reſt of the *Great Barons* not ſubſcribing, and of the *Commons* too, as part of the *Baronage*, *or* **Communitas** of *Earls*, *Barons* **and** others. And I think nothing is more clear then that the **Commons** were part of the *Community* here intended.

Matth. Paris, fol. 578. *Matthew Paris* tells us, that 'twas **ex parte Regni & totius Angliæ universitate**, and this he says was *scriptum* a **Parnagio**, and

Ibid. that the **Commons** were part of the Kingdom at *Parliaments*, and went under the Denomination of the **Parnage** at that very time, is evident beyond Contradiction from Record: for whereas the Title of the Writ expressing some Matters agreed upon between the *King* and his People in

Rot. Pat. 42 H. 3. m 10. that very *Parliament*, is, *pro Rege, & Parnagio Angliæ*, the body of the Writ runs, *Rex omnibus* &c. *cum pro negotiis nostris arduis Regnum nostrum tangentibus proceres, & Fideles Regni nostri ad nos London in Quindena Paschæ prox. præterit facere mus convocari*, &c.

Rot. Pat. 42 H. 3 m. 4. And another Record explains, and reduces to a certainty the *Proceres & Fideles* and the **Parnage**, and calls them *Hanshomes* (the high Men, the Prelates and great Barons) Prodes homes (the **Magnates** and **Grands** of the Counties) and the **Commune de Reaum** (the **Commons** of the Cities and Boroughs) and with this his own Instance out of *Matthew Paris*, exactly agrees, for there were the *Comites* and *Proceres* (the great Barons) the **Magnates**, or **Grands** of the Counties, and alii, who must needs be the **Commons** of the Cities

Stat. St. p 17 E. 3. and Boroughs, as they were distinguished from the **Grands** of the Counties, even as late as the 27*th* *E.* 3.

This

This may ſerve for a *full* and *clear Anſwer* to Dr. *Brady*'s Expoſition of the fore-mentioned Letter, whom both Mr. *Hunt* and Mr. *W.* may thank for miſleading them in this Point; and this ſufficiently ſhews the Vanity and Falſhood of the Doctor's Aſſertion, that the *Commons as at this day known, are not to be found amongſt the Community of* England *in old Hiſtorians*, except he will place *Matthew Paris* amongſt the Moderns.

Dr. Brady *againſt Mr.* Petyt, *p.* 126.

Dr. Brady *againſt Mr.* Petyt, *p.* 130.

This I think may ſuffice in anſwer to any thing wherein Mr. *W.* his Authority may be uſed againſt me.

I cannot be ſo ſhort in my Obſervations upon Mr. *Hunt*, becauſe he aims many Blows at me in the dark, and may be thought in many places to have wounded my Arguments, or the Reputation of my Endeavours, which he repreſents as *impertinent*, or like a Conteſt *de lanâ Caprinâ*.

Mr. Hunt, *p.* 156.

In oppoſition to my Notion of the Curia Regis, he produces another, which he thinks he demonſtrates, whereas Mr. *W.* takes the Curia to have been the only Court where the Tenants could pretend to come ex debito, or Ratione Tenuræ. Mr. *Hunt* will have it that they, and they only, came both to the Curia, and to *Parliament* ex debito whatever others might ſometimes have been called ex Gratia: But then he thinks that he has found a ſure means to diſtinguiſh which was a *Parliament*, and which was a Curia, by the nature of the Summons. If

it was to all *Tenants in Chief by Knights Service* generally, it made a Curia: If the *Great Barons* had ſpecial Summons, 'twas a *Parliament* in his Judgment. To convince him of his Miſtakes in this and other Matters, which he might have rectified, if he had not undervalued the Study of *Engliſh* Antiquities, will not be enough to him, unleſs I likewiſe ſhew how convenient it would have been for him, to have had more regard to ſome of thoſe Matters of Fact within that Learning, which I conceive, I have made good againſt Dr. *Brady*, and which Mr. *Hunt* has not yet vouchſafed to confute, otherwiſe than by an *ipſe dixit*.

Mr. Hunt, p 148.

Firſt, Wherefore I ſhall firſt ſhew him ſome Miſtakes which I am concerned to repreſent to him; And that

(1.) As to the matter in Iſſue, in relation to what our Government was before the 49*th* of *Hen.* 3.

(2.) As to the manner of ſummoning the *Parliament*, or *General Council of the Kingdom*, and the Curia, whereby he thinks he is able to diſtinguiſh the one from the other.

Secondly, I ſhall ſhew the Erroniouſneſs of ſome Suppoſitions which may have contributed to Mr. *Hunt*'s belief, that the *Tenants in Chief* were the only Members of the *Parliament* till the 49*th Hen.* 3. Or that *Tenants in Capite only*, conſtituted both the

the Curia and the *Parliament*, according to the fancied different Summons.

Thirdly, I ſhall ſhew that he himſelf, in effect, grants that more than *Tenants in Chief* had right to come to the *Great Council* of the Nation, in which the Nation's Rights were involved.

Fourthly, That even according to his own Notion of *Tenure in Capite*, all Proprietors of Land, as ſuch, had, till the 49*th* of *Hen.* 3. right to come to the *General Council* of the Kingdom.

Fifthly, That whereas he would ſet aſide the Queſtion of what the Government was till the 49*th* of *Hen.* 3. as *impertinent*.

(1.) His own Notion, by which he would ſupplant the Labours of others, deſtroys it ſelf, while mine maintains what he aims at.

(2.) He puts ſuch matter in iſſue for aſſerting the preſent Government, as can never be maintained.

(3.) He yields ſo much of the Fact againſt me, as ſets aſide the whole Foundation of his *Poſtſcript*. And yet,

Admit he anſwers all Objections againſt his *Poſtſcript*, the Grounds which I go upon are of the moſt general uſe.

(1.) The firſt of his Miſtakes, which I cannot but animadvert on, ſeems to be wilfull; for he renders the matter of late put in Iſſue, as to what our Government was before the 49*th* of *Hen.* 3. to be whether the Counties in all this time had their Repreſen- *Miſtakes.*

Mr. Hunt, p. 155. presentatives in *Parliament* by the Formality of a Choice? and, as if our Government was according to the Conceſſions of them who have lately appeared in the defence of it, *to take it's fate* upon this Iſſue, *viz.* Ibid. p. 154. *Whether our preſent Houſe of Commons, in the ſame form as it is now conſtituted, was not in being ever after the Conqueſt?* and as if we ſhould yeild, that otherwiſe it were *no eſſential part of our Government.*

I muſt confeſs, according to his Inſinuation, that whoever puts it upon this Mr. Hunt, p. 154. Point, *betrayeth the Cauſe of the Government*, but he would do well to name the Man who has done this Diſſervice.

This I muſt confeſs I have inſiſted upon, that Proprietors of Land, as ſuch, without conſideration of *Tenure*, or *collated Dignity*, have from the time of *William* the firſt, downwards to the 49*th* of *H.* 3. enjoyed a Right of coming to the *Great Councils of the Kingdom*, and could not be bound by any Laws to which they had not conſented either in Perſon, or by Repreſentation, yielded to ſometimes before, but not ſetled till the 49*th* of *Hen.* 3.

Mr. Hunt, p. 153, & 179. And Mr. *Petyt* hath ſatisfied Mr. *Hunt* himſelf, that the *Cities* and *Boroughs* were repreſented in *Parliament* from time beyond the account of Records or Hiſtory.

But this I deſire may be conſidered, that admit there were no Repreſentation of the Free-holders *of the Counties* ſettled at any time within the Reign of *Hen.* III, or in any

any other King's Reignnow appearing; and farther, that it cannot be ſhewn, that ſuch **Free-holders** ever came to the *General Councils of the Kingdom* in their own perſonal Intereſt; yet however, if it appear that ſuch as are now repreſented by the *Knights* of the reſpective *Shires*, gave their Votes to *Parliamentary Proceedings*, by ſuch as they particularly appointed to that end before the 49*th* of *Hen.* 3. the preſent Conſtitution ſtands ſufficiently eſtabliſhed without the leaſt Imputation of Novelty, or Uſurpation.

And this were enough for my purpoſe: But ſince many Arguments induce the belief that before the 49*th* of *Hen.* 3. ſuch **ordinary Free-holders** often came to the **General Councils** *of the Kindom* without ſpecial Election and Repreſentation, I ſhould have given too great Advantage to the Underminers of *Common Right*, if I ſhould have undertaken to prove that the *Counties*, from the time of the reputed *Conqueſt downwards, always had their Repreſentatives by the formality of a Choice*, which Mr. *Hunt*, I thank him, would put upon me to prove. Vid. *Jus Anglorum ab antiquo*, Addit. *p.* 20, *to* 32.

His ſecond Miſtake, as to the manner of ſummoning the *Great Council* and the **Curia**, wherein he thinks that there lies an eſſential difference between the two Courts, is nearly conjoyned to the firſt, and if it were no miſtake, would overthrow my Notion: for if, as he holds, only *Tenants in Chief* made

made the *General Council*, of the Kingdom, as well as the Curia, then my belief that others beſides ſuch Tenants had right to come to the *General Council*, would be groundleſs; and it might be probable that the different Summons might diſtinguiſh the Courts.

Mr. Hunt, *p.* 149.

But whereas he fancies it to have been *a diſtinctive Mark, or certain Diagnoſtick of a Parliament, where the Summons were perſonal to the Biſhops, Earls, and the Greater Barons*; if he had been pleaſed to have taken the Pains to conſult the Records, he would have found the Summons to have been as *perſonal* to the Wars, and conſequently to the Curia (which beſides other Occaſions for its ſitting, was held at the place of Rendezvous, to charge *Eſcuage* upon the Defaulters) as 'twas to the *General Council*, which if I prove, I hope 'twill be yielded that the *eſſential Difference* of thoſe two Courts could not ariſe from the nature of the *Summons* to the *King's Tenants*, whether all were called in *general*, or ſome among the reſt in *particular*, but from the Perſons ſummoned, whether only *Tenants in Chief*, or others beſides them.

See Eſcuage *taxt at ſuch a Military Aſſembly*, Inter Com. de Termin. S. Mich. 41. *H.* 3. r. 4. Vid. *Fan. Ang.* p. 240.

In the 47*th* of *Hen.* 3. which to be ſure, was before the 49*th*, there was an Army to be ſent againſt *Llewelin Prince of Wales*, who committed Hoſtilities againſt the *Engliſh*; this 'tis certain was no *General Council* of the Kingdom, being only a Summons to the Wars; and yet the *Great Barons* had *perſonal Summons*, as appears by the Record.

Rex

Rex dilecto & fideli ſuo Rogero de Rigod Comiti Norff. Mareſ. Ang. Salutem; quia Llewellinus filius Griffini et cumplures rebelles noſtri contra Homagum ſuum & fidelitatem nobis debitam terras noſtras & fidelium noſtrorum in partibus Walliæ dudum ut noſtis hoſtiliter ſunt aggreſſi terras illas occupando & devaſtando in noſtrum dedecus & in noſtrum et prædict. fidelium noſtrorum exheredationem manifeſtam vobis mandamus ſub debito fidelitatis & homagij quibus nobis tenemini & ſicut ea que de nobis tenetis diligitis quod in feſto beati Petri ad vincula proximo futuro ſitis apud Wigorn cum Equis & Armis & cum Servitio veſtro nobis debito parati exinde nobiſcum proficiſci in expeditionem noſtram contra præfatum Llewellinum & complices ſuos Rebelles noſtros. Et ita de contentis in hâc neceſſitate noſtrâ ibim veniatis ut dictorum Rebellium noſtrorum verſutia adeo prætenter reprimatur quod nobis et vobiscedat ad honorem & exinde vobis ad grates teneamur ſpeciales. Teſte Rege apud Weſtmin. 25° die Maij. *Rot. Clauſ. 47. H. 3. m. 7. do ſo.*

Eodem modo mandatum eſt Phil. Baſſet, &c.

And this Gentleman (if he had thought fit to have truſted Mr. *Selden*, without taking the *impertinent* Pains as he terms it, of ſearching the Records, might have known that about 130 Temporal Barons had then their ſeveral Writs. *Page* 156. *Seld. Tit. Hon. fol.* 592.

But this Author finding a Precept to a Sheriff, *Quod ſummoneri facias Archiepiſcopos, Epiſcopos, Comites, Barones, Abbates, Priores, Milites, et Liberos Homines qui de nobis tenent in Capite*, &c. concludes that this *Mr.* Hunt, *p.* 148.

this muſt neceſſarily be a **Curia Regis** *in diſtinction to a Parliament, becauſe of the general Writ of Summons:* whereas a little inſight into Records would have acquainted him that the Sheriff was obliged to ſummon all thoſe by a General Proclamation, and then to deliver the particular Writs to the *Great Barons* amongſt them; this Record doth not ſay how they were to be ſummoned; but notwithſtanding this, every one of thoſe Ranks of Men might have been ſummoned particularly: but to prevent all Miſtakes, or Evaſion we have a Record which explains that very Inſtance which he inſiſts upon, it being of that very time.

Rot. Clauſ. 26 H. 3. pars 1. m. 10.

Rex Vicecom. Devon ſalutem præcipimus tibi quod in fide quâ nobis teneris viſis literis iſtis ſcire facias omnibus de Com. tuo qui de nobis tenent in Capite per Servitium Militare vel per Serjantiam & ſimiliter illos qui terras Norman. vel Brittan. tenent de Ballio Domini Regis Johannis Patris noſtri vel noſtro quod ſicut tenementa ſua quæ de nobis tenent diligum ſint apud Winton. die Clauſi Paſchæ Parati cum Equis et Armis ad trasfretandum cum Corpore noſtro in Pictaviam **Literas etiam ipſius certis Perſonis directas in Com. tuo mitti fac:** *T. R. apud Windles 8° die* Februarij.

Here was notice given to all, or *general Summons*, and *particular* Writs alſo to be delivered to ſome of the *Tenants*, and thus, for ought appears to the contrary, it always was.

This

This alone were enough to ſhew that he has miſtaken *King John's Charter*, which he thinks has eſtabliſh'd this difference; but his own Explication of it will make it more apparent.

Which I ſhall conſider under this next Head.

CHAP. II.

Some erroneous Suppoſitions, which may have contributed to Mr. Hunt's *Belief, that the* Tenants in Chief, *were the only Members of the* General Council of the Kingdom *till* 49 H. 3. *or that* Tenants in Capite *only, conſtituted both the* Curia, *and the* Parliament, *according to the imagined different Summons, conſidered.*

ALL the Grounds which Mr. *Hunt* can pretend for this, beſides the matter of Fact in relation to the Summons which I have already examined, muſt be either;

1. From the Interpretation of *King John's Charter*.
2. His Notion of *Tenure in Capite*; or,
3. The belief that *William* the firſt, made an *Abſolute Conqueſt* of this Nation.

If

If *King John's Charter* requires that the *Great Tenants in Chief* ſhould have particular Summons to *Parliament*, then indeed there would be a reaſon why, though all the Tenants in Chief were obliged to attend in the Curia upon general notice, yet ſome might not be concluded by any Act of Legiſlation, unleſs they had notice of Attendance to ſuch end.

But if he knew not what was meant by *Tenure in Capite*, 'tis odds but he might miſtake the Senſe of that part of *King John's Charter* which relates to the *Tenants in Chief*. And if *William* the firſt did not make an *abſolute Conqueſt*, 'twill be wonderful how thoſe that derived from under his Grant, ſhould be the only Perſons intereſted in the Government, excluſive of all others: but if he did make *ſuch a Conqueſt*, then a very little Evidence would be enough to make one believe that none but *Tenants in Chief* were *Cives*, or any part of the *Civil Society*.

To take away all Colour from his Preſumption; I ſhall ſhew,

I. That he gains no help from *King John's Charter*.

II. That he miſtakes the Nature of *Tenure in Capite*.

III. That he would have done well, to have anſwered the Objections againſt the ſuppoſed *Conqueſt*, before he concluded for it.

I. He

I. He can gain no help from *King John's Charter*; for his Interpretation of it fights againſt its ſelf. He himſelf acknowledges a difference between the Curia Regis, and *Parliament*, and particularly that in the Curia *the Suitors aſſeſſ taids and Eſcuage*, to which purpoſes he will have it, that they were ſummoned by *General Writs*; and yet contends, that by *King John's Charter*, the *Great Tenants in Capite*, who were Suitors at the Curia, were to be ſummoned in particular *de ſcutagiis aſſidendis*, to *aſſeſs Eſcuage*; and that the Council where this was aſſeſt, was a *Parliament*, according to his imaginary *diſtinctive Mark*.

P. 131.

P. 148.

Contradictio in Terminis.

P. 163.

But let us obſerve his way of demonſtrating his Senſe of this *Charter*: he divides ſome of the Clauſe, in diſpute, into two parts, and leaves out (as not material to the Enquiry) what particularly relates to the *Cities*, *Ports*, *Burroughs*, and *Villæ* (*Townſhips or Pariſhes*) in which alone, according to his own Diviſion, *the Liberties of ſending Burgeſſes to Parliaments* muſt have been *confirmed and provided for*; and yet, notwithſtanding ſuch omiſſion, will have it that *the modus Parliamenti in King* John's *time, was in the ſaid Charter declared.*

Pag. 168.

His firſt Diviſion is this.

Nullum ſcutagium vel auxilium ponam in Regno noſtro, niſi per Commune Concilium Regni noſtri, *niſi ad Corpus noſtrum redimendum, et ad primogenitum Filium noſtrum*

Militem faciendum, et ad primogenitam Filiam noſtram ſemel maritandam, et ad hoc non fiet niſi rationabile auxilium.

The Charter has further, which is omitmited by him.

Simili modo fiat de Civitate Londinenſi, & Civitas Londinenſis habeat omnes antiquas Libertates, & Liberas Conſuetudines ſuas tam per terras, quàm per aquas: præterea volumus & concedimus quod omnes aliæ Civitates, & Burgi, & Villæ, & Barones de quinque Portubus, & omnes Portus, habeant omnes Libertates, & Liberas Conſuetudines ſuas.

Here Mr. *Hunt*, to be ſure, would have it divided; ſince he begins the other part with **Et ad habendum commune Concilium Regni.** Wherefore 'tis manifeſt, that even according to his rendring of this part of the *Charter*, the *Modus of Parliament* is not declared; the right of the *Burroughs* amongſt other places to come to the *Great Council* being only implied, under the reſt of their Liberties and free Cuſtoms, whereas he himſelf confeſſes, That *we have no Hiſtory of the Commencement of their Right, and that it was an ancient Eſtabliſhment in the Government before Magna Charta.* As I had formerly urg'd in *Jani Anglorum facies nova*, and in *Jus Anglorum ab antiquo*. **Et ad habendum commune Concilium de Scutagiis aſſidendis aliter quam in tribus caſibus prædictis**, either ought to be read along with what relates to the *Cities*, *Burroughs*, *Ports*, and *Pariſhes* or *Townſhips*, and ſo their Right

Mr. Hunt, p. 159.

of

of coming to the **Commen Council of the Kingdom** is provided for in an eſpecial manner, as well as their other *Liberties*, and *Free Cuſtoms*. Or elſe, the right of the Inhabitants of theſe places, the integral parts of the Kingdom, to ſend, or come to the *Common*, or *General Council of the Kingdom*, muſt have been included in the general Proviſion for their *Liberties*, and *Free Cuſtoms*, and no otherwiſe taken care of.

And then *H.* the 3*ds Charter*, being *in nullo diſſimilis*, or the ſame in Subſtance with this of King *John*; and having no expreſs Proviſion for the manner of ſummoning the *General Council of the Kingdom*, and only leaving *Eſcuage* to be raiſed, as 'twas in the time of *H.* the 2*d*, it ſhews that *Eſcuage* was to be raiſed in ſuch a Council ſo ſummoned, as is provided for in King *John*'s *Charter*, with which *H.* the 3*ds* agreed in Subſtance: wherefore to ſay *Eſcuage* ſhould be raiſed, as 'twas in the time of *H.* the 2*d*, was as much as to ſay, that for the *aſſeſſing Eſcuage* the *Arch-Biſhops*, *Biſhops*, *Abbots*, *Earls*, and all the *Great Barons* of the Kingdom *holding in Chief*, were to be ſummoned by *ſpecial Writs*, the other *Tenants in Chief* by general ones, and for this they ſhould have forty days notice.

So Dr. Brady confeſſes out of Mat. Paris againſt Jan. Ang. &c. p. 63, 65. Vid. Jus Ang. *p.* 154.

Et de ſcutagiis aſſidendis ſummoneri faciemus, *&c. King John's Charter.*

But let us ſee what is made of a contrary Expoſition.

By the firſt **commune Concilium**, Mr. *Hunt* conceives the **Curia Regis** was meant, and that *out of that Court the King would not*

Mr. Hunt. p. 166.

impoſe Eſcuage, or Aid upon his Tenants, except it were in thoſe three Caſes of Aid mentioned.

But then, Et ad habendum commune Concilium *Regni aliter quam in tribus caſibus prædictis & de ſcutagiis aſſidendis* he conceives to be meant of Parliament, and that *all matters other than thoſe three mentioned, Aids, and Eſcuage, which were due by Tenure, ſhould be done by that* commune Concilium, *that is, his Parliament.*

Truly I know not how he will free himſelf from a contradiction upon this, when he makes *Et ad habendum commune Concilium Regni aliter quam in tribus caſibus prædictis*, Et de Scutagiis aſſidendis to be meant of a *Parliament*, though before he had exempted *Eſcuage* from the Court of *Parliament* and aſſigned it to the Curia. And this ſhews clearly, that no other Council but the Curia Regis is there mentioned, there being no Proviſion, except what was contained under *Liberties*, and *Free Cuſtoms*, for any other matters beſides *Eſcuage*, and *Aids*, and theſe ſuch as he confeſſes to have been due from the *King's Tenants*, for where 'tis *Nullum Scutagium vel auxilium ponam in Regno noſtro, niſi per commune Concilium Regni noſtri.* By this *commune Concilium* he owns the Curia Regis was meant.

For the three *Aids* excepted in the *Charter*, to be ſure there was no need of a *Council of Tenants*, they being Incidents, and of courſe raiſed and returned into the Exchequer, and the King expreſly reſerved unto him-

himſelf a Power of raiſing them without convening any Council at all; ſo that in ſhort all the *Common Council* that can be here found by him is only a **Curia Regis** for the aſſeſſing of *Eſcuage*, ſo that where 'tis *Nullum Scutagium vel auxilium*, *auxilium* is confined to ſuch as lay upon the Tenants who were to be ſummoned to the **Curia**, who were Tenants *by Knights Service* only; and therefore he rightly obſerves (if he takes it of ſuch as held not *per ſervitium Militare*) *Page* 151. that the *Burgeſſes* were not *Suitors to the* **Curia Regis**, and where 'tis **Commune Concilium de Auxiliis, & de Scutagiis**, if they ought to be joined together, the Word *Scutagium* brought in with an **and** is *exegetical*, and *explanatory* of the general Word *Aid*, and confines it to *Aid* upon Tenants *by Knights Service*: and it is certain that the matters excepted were incident to *Knights Service* as well as *Socage Tenure*. According to which, as *London* held in common *Socage*, *ſimili modo fiat de Civitate London*, muſt be meant, that as *Eſcuage* was raiſed in the *Common Council of the Tenants by Knights Service*, in like manner *Tallage* in *London* ſhould be ſettled in its *Common Council*; for according to Mr. *Hunt*, the City of *London* being a Burrough, was no part of the **Curia Regis**, which he ſays is the *Commune Concilium* juſt before mentioned, wherefore *ſimili modo fiat* can have no other meaning; being 'tis manifeſt that their *Aid* was to be raiſed in a *Common Council*.

After all it must be agreed, that this Charter is not carefully, and clearly penn'd, however here is enough to shew that it cannot possibly serve the contrary side. Besides the uncontroulable Evidence of what was the *modus* of *General Councils* both before, and after the making of this Charter, till the 49*th* of *H.* the 3*d*.

Vid. *Jan. Ang. Facies nova throughout.*

But Mr. *Hunt* might well be out, in his Interpretation of King *John*'s Provision about the *Tenants in Capite*, since.

II. He mistakes the Nature of *Tenure in Capite*, which I shall evince by these three particulars.

1. In that he supposes that none of the Tenants in Chief were *Majores Barones*, but Bishops, and Earls.

2. That none were *Barones Regni*, but Tenants in Chief, and none *Barones Regis*, but such as were called of Grace to Parliament.

3. In imagining that if a *Tenant in Capite*, granted out to never so many, all the Grantees were *Tenants in Capite*, and owed the same entire Service that the first Grantee did.

1. His Errours upon his first and second Heads cannot be truly shown, unless they be fully transcribed in their full Dimensions.

Page 156. 'When the Conqueror (says he) did innovate his Tenures in *Capite*, and made all 'Men of great Estates *Barons*, and by their 'Tenures

'Tenures and Eſtates Members of Parliament, we then had ſuch Laws, *quas vulgus elegerit*, and the nwe had materially our three Eſtates, though not ſo well ſized and ſorted as ſince.

'We had then I ſay many great Freeholders in every County that by their Tenures were Members of Parliament, whereas now we have but two, and tho the People did not not chuſe them, yet the Men of that Order, ſeem choſen once for all interpretatively by the People in their conſent to the Government. In this Conſtitution, ſcarce any Man that was fit to be choſen, but was without the Peoples choice a Member of Parliament, as there now are more who are fit to be choſen than they can chuſe, ſo that the *Barones Minores* were then inſtead of Knights of the Shire, and the *Barones Majores*, **Biſhops and Earls** did then, as now, make the Parliament. *Mr.* Hunt, *p.* 157.

'Beſides, *Barones Majores* and *Minores* there, was at this time a diſtinction between the *Barones Regis*, and *Barones Regni*, which I will explain, to prevent any Miſtake that may grow thereupon: The *Barones Regni*, were Barons by Tenure, and made part of the Government by the Conſtitution of the firſt *William*, and ſo in proceſs of Time, called *Barones Regni*, becauſe they had by Continuance of that Conſtitution, acquired a fixed Right to that Honour.

But becauſe of the frequent Wars between the Barons and the Kings at that *Page* 157.

'time, they did omit to ſummon, ſome who 'were Barons by Tenure, and now duly 'called *Barones Regni*, to *Parliament*, and called 'others, that had no Right to be called *Ratione Tenuræ*, and thoſe they called *Barones Regis*. This was ill taken by the Lords, 'and was one of the occaſions of their War 'with King *John*, upon which they obtained 'his Charter for Remedy, as follows. *Barones Majores Regni ſigillatim ſummoneri faceret*; 'the truth of this as to the Fact will appear 'by the Hiſtory of thoſe Times; and 'that this is the reaſon of this diſtinction of '*Barones Regis* and *Barones Regni*, doth appear by the recited *Charter of King John*, 'where the *Majores Barones* are called *Barones Regni*; for the Barons were more concerned for the loſing of their Honours, 'than they were at the Communication of 'the like Honour to others, and with reaſon, though all Honours are leſſened by 'the numbers of thoſe that participate of 'them.

Mr. Hun. p. 158. 'The Inconveniency and Miſchiefs of this 'Conſtitution were very great, and very 'ſenſible, by making the Government to 'conſiſt of one Order, there was no third to 'moderate and hold the Ballance.

I ſhall not here enlarge upon his πρῶτον ψεῦδος, of the *Conqueſt*, nor upon his Conjecture of one of the Occaſions of the Barons Wars, nor yet upon his notion of three Eſtates materially the ſame when but one Order, and by the ſame reaſon, if all were in one, by

by virtue of his Spiritual and Temporal Power, and he had by a *Conqueſt* all the property of the Nation, here the Government was materially the ſame, with Lords Spiritual and Temporal, and Commons in his Belly, as when he had diſgorged, and ſcattered abroad the Property and Power.

But to the purpoſe of the above-mentioned Heads.

1. Whereas he will have it, that only Biſhops and Earls were *Majores Barones*, it appears manifeſtly to the contrary from the words of King *John*'s Charter, which he miſtakes, *Submoneri faciemus Archiepiſcopos, Epiſcopos, Abbates, Comites & Majores Barones Regni, Sigillatim.*

Here are **Majores Barones** *Regni*, after *Biſhops* and *Earls*: And I need not here remind him of the Vanity of the Notion of making **Majores Barones** *exegetical*, or *comprehenſive* of what went before. 'Tis certain if *Biſhops* were **Majores Barones** as well as *Earls*, here are others intended alſo; and why are not ſuch as held whole Baronies, as ſome did, *Great Barons?* Beſides, you ſhall find numbers of *Barons* to have received particular Summons, even to the Wars, according to the Proviſion in King *John*'s Charter for ſummoning the **Majores Barones** *Sigillatim.*

I will give him ſome Names, and ſee whether he makes *Earls* of them all.

Three

Clauſ. 47. H. 3. *m.* 7. *d.*

Three Baſſets.

William de Harecourt.
Roger de Somerey.
John Forreigner, Extraneus.
Richard de Grey.
Ern. de Boſco, &c.

But if all theſe were *Earls*, what thinks he of the nine hundred and odd, who received ſpecial Summons, *De veniendo ad Regem cum Equis & Armis uſq; Berwicam ſuper Twedam* in the 29th of *Edw.* 1.

Clauſ. 29. E. 1. *m.* 14 *d.*

Mr. Hunt, *p.* 158.

2. Whereas he will have it that the **Barones Regni** were *Barons by Tenure*, and the **Barones Regis** by *Call to Parliament*, he might have known that every **Baro Regis** was a *Baron* of the Kingdom, but every *Baron* of the Kingdom was not **Baro Regis**, in a ſtrict Senſe. Wherefore accordingly King *John*'s Charter confines the ſpecial Summons, which as, I ſay, was to the *Curia Regis*, to ſuch *Great Barons* of the Kingdom as held *in Capite*. There being after *Majores Barones Regni* in a different Proviſion, *Et omnes alios qui de nobis tenent in Capite.*

Wherefore when all the *Barons* of the Kingdom were ſummoned, it took in the *Majores* and *Minores*, both thoſe that held *in Capite* and otherwiſe. But when they are uſed diſtinctly, 'tis wholly contrary to his Suppoſition; for the *Barones Regis* were properly, and ſtrictly, they who held immediately of the King, as all manner of Authorities warrant.

Indeed

Indeed I am almoſt aſhamed here to bring Proof of a thing ſo evident: But he may pleaſe to obſerve that *Thanus* and *Baro* were always of the ſame Acceptation. *Thanus Regis* was ſtrictly, he who held Lands of the King by any kind of Tenure; and ſo was *Baro Regis*; tho ſomtimes appropriated to him that held by *Knights Service*, and an ordinary *Thane* was no more than an honeſt *Free-holder* by any ſort of Tenure, as appears by *Doomſ-day*-Book it ſelf. *Vid.* Jus Ang. ab antiquo, *p.* 108.

But I conceive the Difference between *Baro Regni* and *Regis*, is ſufficiently ſhewn in this following Authority.

In the 23*d* of *Hen.* 2. *Benedictus Abbas*, tells us the King ſummoned *Magnum Concilium de Statutis Regni ſui coram Epiſcopis, Comitibus, & Baronibus Terræ, & coram eis per Concilium Comitum, et Baronum, Militum, et hominum ſuorum*; he made the ſam'd Aſſize at *Northampton*. Benedictus Abbas ſub Effigie, *Julij* A. 11. *f.* 72. *in Bib. Cot.*

Here are *Barones Terræ*, or *Regni*, and *Barones, Milites, et Homines ſui*. Here either all the *Barones Regni* were *Barones Regis*, or *ſui*: And then his diſtinction between *Baro Regni* and *Baro Regis* falls to the ground; there being no Difference; or elſe there is that very Difference I ſtand upon, *viz.* That the *Barones Regni* were comprehenſive of all ſorts of Barons, the *Barones Regis* were the King's Tenants *in Capite*. Amongſt which, there were Knights at leaſt: And the *Homines ſui*, I take it were

were his great Officers and Juſtices. Theſe made a *Select Council*, acting in Parliament, and out of it, either in a full Body, or contracted by Agreement, as I could eaſily ſhew.

But the *Tenants in Capite*, were the King's ordinary Council, and therefore manifeſtly the Aſſize there was drawn up and adviſed by them in full Parliament, with the Conſent of all the *Barons of the Kingdom*: under which, in thoſe ancient Times *omnes quodamodo ordines Regni continebantur*, as Mr. *Cambden* obſerves. But 'tis obſervable, that here 'tis *Homines ſui*, or *Regis*, to ſhew that the Juſtices and others, who came not upon the account of Free-hold, but as the King's Servants, were not to be termed *Barones ſui*.

Cam: Ordines Angl. *p.* 61. Quarto.

Vid. Jan. Aug. facies nova, *p.* 189.

A few Years before this, there was a Summons for an Aſſembly at this very place; and 'twas manifeſtly no more than a Curia Regis.

Tit. *of* Hon. *f.* 583.

1. Whereas there were the Barones Terræ at the laſt above named, to this were ſummoned only *Tenants in Capite*.

2. Whereas then they were to exerciſe a Legiſlative Power, *de Statutis Regni*; this was only for a Judicial Power, ſuch as Tenants *in Capite* exerciſed by themſelves, for 'twas only upon the Caſe of *Becket*.

3. Whereas the former was called, *Magnum Concilium de Statutis Regni*, this *Magnum Concilium*, as ſome call it, was but Curia Regis: Barones Curiæ Regis *adjudicaverunt*

caverunt eum esse in Misericordia: As *Hoveden* informs us. Hoveden, *f.* 494.

Now the Question is, Whether those Tenants *in Capite*, the *Barones Curiæ*, were *Barones Regis*; which that they were, I think is very obvious, they being, by reason of holding of the King, obliged to attend at his Court: And that these were the *King's Barons*, or *Barons of his Court*, or owing Suit, and Service there, must needs be synonimous.

But utterly to silence this Gentleman, he grants that *Hen.* I. was crown'd in *an extraordinary Convention of the People*; that is more than *Tenants in Chief* consented to that *Change in the Succession.* *Mr.* Hunt, *p.* 153.

Now that very King's Charter, says 'twas *Communi Concilio Baronum Regni*; when among these he comes to mention such as held of him in *Chief*, he calls them *his Barons*, emphatically (not but that all were his Barons in a remote sense) *Si aliquis Baronum meorum, vel Comitum, sive aliorum qui de me tenent mortuus fuerit, hæres suus non redimat Terram suam sicut faciebat tempore Fratris mei.* *Magna Charta*, H. 1.

This Relief, it seems, in his Brother's time was uncertain, and immoderate, and was by him reduced to the old Standard, as 'twas in *Canutus* his time, as appears by the Comparison of the Laws of both.

The Earls Relief was eight Horses, four with Furniture, four without, besides Arms, and a certain quantity of Gold. Spelman's *Gloss. Tit. Hoverum.*

The

Spelm. *Gloſ. Tit. Heriot.*

The *Thanus Regis primarius*, as in King *Canutus* his Law, or *qui ei proximus*, as in *Henry* the 1*ſt*, paid for Hereot or Relief, which there were ſynonimous, four Horſes, two with Furniture, two without, &c. The *Mediocris Thanus* paid one Horſe with Furniture, and other things more or leſs, according to the Cuſtom of the Places under different Laws.

Here was *Thanus*, or *Baro Regis primarius*, the ſame with *Baro Major*, and *Thanus Mediocris*, or *Baro Minor*, one of the *alij qui de nobis tenent in Capite* mentioned in King *John*'s Charter: And ſurely no Man will ſay that this Relief was not payable becauſe of *tenure in Capite*.

By the 17*th* of King *John*, it had become cuſtomary for the Relief to be paid in Money; as appears by his Charter.

Magna Charta Johannis *Rs.*

Siquis Comitum vel Baronum noſtrorum, ſive aliorum tenentium de nobis in Capite per Servitium Militare mortuus fuerit & relevium debeat, habeat hæreditatem ſuam per antiquum relevium, ſcilicet hæres vel hæredes Comitis de Baroniâ Comitis integrâ per centum libras, hæres vel hæredes Militis de integro feudo, Militis per centum ſolidos ad plus, et qui minus debuerit minus, vel ſecundum antiquam conſuetudinem feudorum.

Here *Baro noſter* was manifeſtly the ſame with *Thanus Regis* in the older Laws; and *Baro de Baroniâ integrâ*, with *Thanus primarius*, or *qui ei proximus*. The *Mediocris Thanus Regis* was the *Miles*, or *liberæ te-*

nens

nens, one holding in Chief by Knights Service, by whatſoever Proportion of a Knights Fee.

And by this time I think 'tis evident, that they whom Mr. *Hunt* ſuppoſes to have been the only *Barones Regni*, were in a ſtrict Senſe the *Barones Regis*, and but part of the Barons of the Kingdom.

3. Whereas he imagines that if a Tenant *in Capite* by *Knights Service* granted out to never ſo many, they all owed the ſame *entire* and *indiviſible* Service to the King, and were his *Tenants in Capite*; in this he muſt needs have been miſtaken: But that I may not ſeem to miſrepreſent his Senſe, I ſhall tranſcribe his Words, and then endeavour to bring them out of their Clouds.

'The Feudal Baronage, ſays he, was as 'large and as numerous as the Tenures by 'Knights Service in Chief, which were ca- 'pable of being multiplied ſeveral ways, 'for every part of the Fee, however divided, 'the Services reſerved upon that Fee that 'were entire and indiviſible, were to be 'performed by the ſeveral Proprietors of 'the ſeveral parts of the divided Fee. P. 163, & 164.

In this Paragraph there are three *poſtulata*.

1. That Tenure by *Knights Service in Chief*, was Tenure by *Barony*.

2. That every Tenure by *Knights Service* had ſome *entire indiviſible* Service incident to it.

3. That

3. That this *entire indivisible* Service was multiply'd to the benefit of the King, upon the Tenants aliening any part of the Fee.

The two first I agree to his Hands; but dispute the third, I conceive with good reason: For upon the first view 'tis evident, that if the Grantee of the King's *Tenant in Chief by Knights Service* would (before the Statute of *Quia emptores terrarum*) have been a Tenant in Chief, by reason of the entire and *indivisible Service* incident to the Tenure of his Land, by the same reason the Grantees of Land held of the King in Chief by *Socage* or other *Free Tenure* would have been *Tenants in Capite*, because of Fealty, which is as *indivisible* an incident to all other Free Tenures, as *Homage* or any thing else belonging to *Knights Service*. And by Consequence upon this Notion, since the King, even before the pretended *Conquest*, had *ratione Coronæ*, the Supream Signiory of all the Land of the Kingdom, as the *Mirror* shews: All the Land of the Kingdom would have been held of the King immediately before the Statute of *Quia Emptores terrarum*. And then to be sure ever after, since that provided that Lands shall be held as the *Feoffor* held over, which by this opinion must always have been of the King immediately.

After the Statute of Quia Emptores *entire Services, as Fealty, Hiriots, and the like, might be multiplyed to the Lord, upon the Tenants parcelling out the Lands, but not before. Vid.* Talbot's *c.* 8. *R. f.* 105 *a.* So Brueton's *c.* 6, *Rep. f.* 1. & 2. 1 Inst. *f.* 93. *a.* Mirror. *p.* 7.

But I must needs say, this Errour of Mr. *Hunt*'s is the most excusable of any I meet with in his Book, because the great Lord *Cook* leads him the way.

For

For he tells us, and refers to the *Mirror* for Proof, 'That by the Laws and Ordi-
'nances of ancient Kings, and especially of
'King *Alfred*, it appeareth that the first
'Kings of this Realm had all the Lands of
'*England* in demesne, and *les Grandes*, *Man-*
'*nors & Royalties*, they reserved to them-
'selves: and of the Remnant they for the
'Defence of the Realm, enfeoft the Barons
'of the Realm with such Jurisdiction as the
'Court Baron now hath, and instituted the
'Free-holders to be Judges of the Court
'Baron. 1 *Inst. f.* 58.

The Author of Antid. Brit. *builds much upon that Authority.* Antid. p. 10.

Then he tells us in his second *Institutes*, 'That till the Statute of 24. *E.* 3. whereby
''tis provided that Alienations of Lands
'made by Tenants, which held of *H.* 3. or
'of other Kings before him, to hold of them-
'selves, should stand in force, saving to the
'King his Prerogative of the time of his
'Great Grand-Father, his Father, and his
'own: It was doubted, whether the King's
'Tenant, might have given part of the Te-
'nancy to hold of himself. 2 *Inst. f.* 65.

Which is in Effect the same with Mr. *Hunt*'s Notion of all the Tenants holding of the King in Chief.

1. But 'tis obvious that by what the Lord *Cook* said of the Laws of King *Alfred* and others, whereby he supposes Tenures were erected not only of the King, but of his Grantees, who had their Court Barons: His Opinion was that the King's Tenant might have granted out to hold of himself,

for otherwiſe how could he have had his Court of Tenants?

2. Whereas he ſuppoſes that the Laws of King *Alfred*, ſhew that the Kings had all the Lands in Demeſne, there is but one Law of King *Alfred*, mentioned in the *Mirror*, and that is for the great *Councils* aſſembling at *London* twice a year, or oftner, if need be; Not any thing of Tenures.

1 *Inſt.* ibid.

3. But amongſt the Eſtabliſhments made *per cel eſtate per pluſors Roys*, by ſeveral Kings in Parliament, the *Mirror* ſays, *Aſſentus fuiſt que les choſes ſuivant ſerrent appendant aux Roys & al droit de la corone, Soveraigne juriſdiction, la Soveraign Signory*, &c. *come Franchiſes, treaſure trove*, &c. Then it goes on *Ceux droits retiendrent les primers Roys & del remnant de la terre enfefferont les Countees, Barons*, &c.

Mirror *p.* 11.

Here 'tis plain that no more than the Rights aforeſaid, amongſt which *Chief Cities*, *Chief Ports*, and *Great Manners* were named, not all the Lands, were retained by the firſt Kings: And tho they are ſaid to have Infeoff'd others of the reſt of the Land to hold of them, yet that does not neceſſarily imply that they had all in them before: Nay, the *Mirror* ſhews the contrary; for it ſays, 'That after God pleaſed to abate the 'Britiſh Nobility, who uſed Force rather 'than Law, he left the Realm to the moſt 'humble and ſimple of all the adjacent 'Countries, the *Saxons*, who came to con-'quer it from *Almain*, *de la quel gent il y en-*

Ibid. *p.* 7.

'rent

'rent ieſque quarant Soveraigns que touts ſoy 'tsendrent a Companions. Amongſt theſe forty *Princes*, being equal and independent, here was no King, till they came to make a Choice. And ſo the *Mirror* tells us they did, having felt the ſmart of their Competitions. Then *Eſlierent de eux un Roy a reigner ſur eux & Governer le People de dieu & a Maintainer & Defendre les Perſons & les Biens en quiet per les Rules de droit.*

This ſhews they did not reſign their Properties to the King, for they choſe him to defend them, yet it ſeems they conſented to take Grants from the King by ſuch Services as were in common agreed upon: And though they were principally from him, as Head of the Body Politick, yet any Man that obſerves the Forms of the *Saxon* Kings Grants, will not think it a vain Imagination, that ſuch as I ſpeak of, ſhould have been with univerſal Conſent.

vid. Spelman's *Councils*, Vol. 1. *f.* 340. Rex non potuit diſtrahere patrimonium Regni ſine aſſenſu procerum.

4. But I cannot find any Warrant to queſtion the Tenants Power at the Common Law to Grant out to hold of himſelf. And I am ſure there is an expreſs Reſolution for it in *Dyer*, the Words are thus in *Engliſh*;

'A Man ſeized of a Mannor in Fee, held 'of the King *in Capite*, before the Statute 'of *Quia Emptores Enfeoffs* J. S. of part of 'the demeans in Fee, without ſaying more: 'the *Feofee enfeoffs* another to hold of the '*Feoffor* and his Heirs by 26 *s.* and 8 *d.* 'Rent for all Services. The Land clearly

Dyer 13. Eliz. *f.* 229. b.

'is not held *in Capite*. And the first *Meſ-*
'*nalty* is not held of the *Feoffor* as of the
'Mannor by *Knights Service*.

The Statute of 34 *E.* 3. mentioned before by the Lord *Cook*, is not in the leaſt contrary to this: For whereas before *Magna Charta*, the King's Tenant might have alien'd as he pleas'd, and *Magna Charta*'s Proviſion (*Quod nullus liber homo det de cætero amplius alicui, vel vendat alicui de terrâ ſuâ, quàm ut de reſiduo terræ ſuæ poſſit ſufficienter fieri Domino feodi ſervitium ei debitum, quod pertinet ad feodum illud*) interpretatively gave a Fine to the King when his Tenant alien'd; which was not due before that great Charter was made; The Statute 34. *E.* 3. gave the King Fines for Alienations made in the time of any King, even before the making of the *Charter*.

Magna Charta *cap.* 32.

The Lord *Cook* cites an Anſwer to a Petition in Parliament, 18. *E.* 1. *Rex non vult aliquem medium*, which is no more than that he would not grant his Tenant who then petition'd, Licence to alien: However he had not forfeited his Land if he had alien'd, but the King might have entred and ſeized the Land in the Name of Diſtreſs for a reaſonable Fine for the Treſpaſs: Which the Lord *Cook* takes for the *better Opinion*. And if the Land were forfeited, to be ſure the *indiviſible Service* could not have been multiplied, as Mr. *Hunt* imagines.

2 *Inſt. f.* 66.

'Tis

'Tis certain, that tho at the Common Law the King, or any other Lord, might have diſtrained for his Services, reſerved upon the Original Grant, in the Lands of any inferiour Grantee as well as in the Lands of his immediate Tenants; yet there was this Inconvenience, that the Wardſhips and Marriages were not ſo conſiderable when the Lands were parcell'd out, and the Lands of the immediate Tenant, (who only was to be in Ward, or to be married by the firſt Grantor) were of leſs value. 1 *Inſtit.* f. 142.

Therefore was that Proviſion by *Magna Charta*, by the Interpretation of which, the King was to have Fines upon Alienations. But tho the Inconvenience of Tenants aliening to hold of themſelves, was taken away by the Statute of *Quia emptores Terrarum*, 18 *Edw.* 1. which gave Tenants free Power to alien their Lands; and provided that the Alienees ſhould hold of the Alienors immediate Lords with an Apportionment of Services: Yet Licences of Alienation being of ſettled Prerogative, were not taken away from the King, he not being named in the Statute. 2 *Inſtit.* f. 67.

By that Statute indeed, if a Tenant *in Capite* aliened with Licence, the Alienee became Tenant *in Capite*; for the Statute divided the Signiory. But how it could be at the Common Law in any other Caſe than that of Copartners, who are but as one Heir, and plac'd in the ſame Relation

to the Lord, I cannot imagine. I find in the Statute of *Ireland* this of Copartners is mentioned as the Law of *England*.

14 H. 3. Tit. *Prerog. Stat. de* Hibernia 1 *Inſt.* ſ. 67. *a.*

In Regno noſtro Anglia talis eſt Lex & Conſuetudo, quod ſiquis tenuerit de nobis in Capite, & habuerit Filias heredes, ipſo patre defuncto, anteceſſores noſtri habuerunt, & ſemper nos habuimus, & cepimus homagium de omnibus hujuſmodi Filiabus, & ſingula earum tenerent de nobis in Capite in hoc Caſu.

Which ſhews that the Caſe of Copartners (being a ſingle Inſtance of the continuance of the ſame immediate Service, notwithſtanding the diviſion of the Fee,) was an Exception out of a general Rule.

But I dare ſay, no body that underſtands any thing of the Feudal Law, as it has been received in this or other Nations, will be of Mr. *Hunt*'s Opinion in this particular.

3*dly*, Mr. *H.* would have done well to have anſwered the Objections againſt the ſuppoſed Conqueſt before he concluded for it; and I ſhall take it for granted, 'tis a Queſtion heartily begg'd, 'till I find an Anſwer to theſe Arguments in *Jus Anglorum ab antiquo*.

Vid. Jus Ang. *p.* 34, *to* 58, & *p.* 139. *Mr.* Petyt's *Preface*, P. 20. So *Rot. de temp.* R's Jo. *Lord* Hales *his Collections on* Lincolns-Inn, *lib.*

1. That the Hiſtories of thoſe Times prove undeniably, that *William* the firſt came in upon Terms, which he ſwore to at his Coronation, and ſolemnly confirmed afterwards. This indeed was a *Conqueſt* in the Language of thoſe times, as 'twas diſtinguiſh'd

ſtinguiſh'd from an Hereditary Right, but no otherwiſe.

Thus in King *John*'s time, a Man pleads, that his Father had ſuch a thing *de Conqueſtu ſuo*, viz. by his own Purchaſe or Acquiſition.

2. That Dooms-day-Book it ſelf demonſtrates that Men enjoyed their Lands under their old Titles, And thoſe Laws of St. *Edw.* which the Hiſtories aſſure us were confirmed by Compact with *William* the firſt, without particular Confirmation of their Eſtates. Jus Angl. *p.* 80 *to* 100.

3. That we have later Records of the allowance of Titles derived from before the *Norman* Acquiſition, nay, even of the whole Palatinate of *Cheſter*, the Title to which was laid only in Deſcent, even after King *William*'s Confirmation. Ibid. *p.* 112, *to* 117.

4. That ancient Hiſtorians, and Dooms-day-Book confirm the Opinion of that Judg in *Edw.* III. time, who informs us that *William* the firſt, diſſeized only them that were in Arms againſt him, and forfeited by oppoſing that Title which the Nation received. *Addit.* p. 90. Jus Angl. *p.* 99, *to* 106. *Mr.* Hunt, *p.* 130.

Till Mr. *Hunt* has anſwered theſe Arguments amongſt others in *Jus Anglorum ab antiquo*; I hope he will not be angry that ſome are *ſo critical that they will not call the firſt* William, *Conqueror*; eſpecially ſince *Conqueſtor* and *Conqueſtus* cannot now be reduced to their old peaceable Signification.

And therefore are by no means to be admitted, unless we take the sense of the Judicious Lord *Clarendon*, who rebukes Mr. *Hobbs* for insisting upon *William* the first his Title by Conquest, as being what he himself renounced and abdicated, if he ever had it.

Survey of the Leviathan, p. 109.

If Mr. *Hobbs* says that unhappy Great Man, 'Had taken the pains, and known 'where to have been informed of the Pro-'ceedings and Transactions of *William* the 'Conqueror, he would have found Cause 'to believe that that great King did ever 'dexterously endeavour from the time that 'he was assured that his Possession would 'not be disturbed, to divest himself of the 'Title of a Conqueror, and made his 'legal Claim to what he had got by the 'Will of *Edward* the Confessor, whose 'Name was precious to the Nation, and 'who was known to have a great Friend-'ship for that Prince, who had now reco-'vered what had been his.

'And he knew so well the ill Conse-'quence which must attend the very ima-'gination that the Nation had lost its Pro-'priety, that he made haste to grant them 'an Assurance that they should still enjoy 'all the Benefits and Priviledges which 'were due to them by their own Laws and 'Customs: By which they should be still 'governed as they were during that King's 'whole Reign, who had enough of the un-'questionable *Demesnes*, and Lands belong-

'ing

'ing to the Crown, of which he was then 'poſſeſt without a Rival, and belonging to 'thoſe Great Men; who had periſh'd with 'their Poſterity in the Battel with *Harold*, 'to diſtribute to thoſe who had born ſuch 'Shares, and run ſuch Hazards in his proſ-'perous Adventure. And thoſe Laws and 'Cuſtoms, which were before the Con-'queſt, are the ſame which the Nation and 'Kingdom have been ſince governed by to 'this day; with the Addition of thoſe 'Statutes and Acts of Parliament, which 'are the Laws of the Succeſſive Kings, with 'which they have gratified their Subjects, 'in providing ſuch new Security for them, 'and Advantages to the Publique, as upon 'the Experience and Obſervation of the 'Ages and Times when they were made, 'contributed to the Honour and Glory of 'the King, as well as Happineſs of the 'People. Many of which are but the Co-'pies and Tranſcripts of ancient Land-'marks, making the Characters more plain 'and legible, of what had been practiſed 'and underſtood in the preceding Ages, 'and the Obſervations thereof are of the 'ſame Profit and Convenience to the King 'and People.

And upon Mr. *Hobbs* his Suppoſition, that *William* the firſt, *at his Reception had diſpens'd with the Subjection of the Eccleſiaſticks, by the Oath he took not to infringe the Liberty of the Church*: The Lord *Clarendon* has to the ſame purpoſe with the former, or rather

as

as evidence that there was no colour of a Conqueſt, theſe words:

Survey of the Lev. p. 148.

'They who know any thing of that 'time, know that the Oath he took, was 'the ſame, and without any Alteration, 'that all the former Kings, ſince the Crown 'had reſted on a ſingle Head, had taken, 'which was at his Coronation, after the 'Biſhops and the Barons had taken their 'Oath to be his true and faithful Subjects: 'The Arch-biſhop who crowned him, pre-'ſented that Oath to him which he was to 'take himſelf, which he willingly did, to 'defend the holy Church of God, and the 'Rectors of the ſame; to govern the uni-'verſal People ſubject to him, juſtly to 'eſtabliſh equal Laws, and to ſee them 'juſtly executed. Nor was he more wa-'ry in any thing, than, as hath been 'ſaid before, that the People might ima-'gine that he pretended any other Title 'to the Government than by the Con-'feſſor; tho it is true, that he did by de-'grees introduce many of the *Norman* 'Cuſtoms, which were found very uſeful 'or convenient, and agreeable enough, if 'not the ſame, with what had been former-'ly practiſed. And the common Reproach 'of the Laws being from time to time put 'into *French*, carries no weight with it: 'For there was before that time ſo rude a 'Collection of the Laws, and in Languages 'ſo Forriegn to that of the Nation, *Britiſh*, '*Saxon*, *Daniſh* and *Latine*, almoſt as un-

'intelligible

'intelligible as either of the other, that 'if they had been all digeſted into the 'Engliſh, that was then ſpoken, we ſhould 'very little better have underſtood it, than 'we do the French, in which the Laws were 'afterwards rendred. And it is no wonder ſince a Reduction into order was neceſſary, that the King who, was to look 'to the Execution, took care to have them 'in that Language which himſelf beſt underſtood, and from whence iſſued no Inconvenience, the former remaining ſtill 'in the Language in which they had been 'written.

CHAP.

CHAP. III.

That Mr. Hunt *himſelf in Effect grants, that more than Tenants in Chief had right to come to the* Great Council *of the Nation in which the Nation's Rights were involved.*

Mr. Hunt, *p.* 153. ‘I Do not deny, (ſays he) but upon a Change in the Succeſſion to the Crown, there might have been in this time extraordinary Conventions of the People, to declare their univerſal Aſſent for better aſſuring ſuch Succeſſors, diſcountenancing the real Prince, and preſerving the Peace, as in the Caſe of *William* the ſecond, *Henry* the firſt, King *Stephen*, and King *John*, &c. with an aſſent of ſuch an Aſſembly as this; at leaſt King *John* ſhould only (if ſo) have made his Kingdom Tributary to the Pope.

1. Here he grants that ſometimes more than Tenants *in Capite* aſſembled at Council.

2. That to ſome purpoſes ſuch Aſſemblies were needful, not only to quiet the Minds of the People, but to transfer over a National Right.

For, he ſays, if ever there were *extraordinary Conventions*, which he owns to have been

been in ſome Caſes, then King *John* could have made the Kingdom Tributary only in ſuch a Council, *viz.* an *extraordinary Convention.* Wherefore *Government* being, as he ſays, *Rei Publicæ Communis Sponſio*, he grants, that the Government here, was not abſolutely in the King and his Tenants in Chief: For if it had, they might have diſpoſed of all the Nation's Rights. *Page* 155.

Wherefore in effect, he yields, *That the Men of that Order were not choſen once for all interpretatively by the People in their Conſent to the Government.* Ibid. *pag.* 157.

But further, if he yields us thoſe Authorities which ſhew that the People of the Land, the *Free-holders*, uſed to aſſemble for the declaring their Aſſent to the Supream Governour, with what colour can he ſet aſide thoſe Authorities which mention Aſſemblies to other purpoſes in as general Terms?

If an *ordinary Free-holder* was under the word *Populus* at an Election to the Crown, or Recognition of a Title; how comes the Signification to be reſtrained at other times? Will not *Vulgus*, *Plebs*, *Populus minor*, *Laici mediocres*, and the like, denote more than Tenants *in Capite*, as well at one publick Aſſembly in the ſame King's Reign, as at another? Unleſs a prior Law be ſhewn, which excludes the Commons from one *Council*, but admits them to the other? But I cannot find any thing more in this Suppoſition than a downright begging the Queſtion. Supra *p.* 212.

Indeed

Indeed if *William* the firſt made a Conqueſt of *England*; ſo as that he divided out all the Lands of the Kingdom to be held of him in Chief: And the Alienees of *Tenants in Chief* ſtill held immediately of the King; neither of which will readily be proved: then indeed, but not till then, the *Populus Minor* at the *Councils* would be taken for the *Tenants in Chief* only. But the admittance that the preſence or conſent of more than *Tenants in Chief*, was at any time needful to any Act of rightful Civil Power, wholly deſtroys the ſuppoſition of a *Conqueſt*; unleſs we can believe that the conquer'd ought to give Laws to the Conqueror; or that, notwithſtanding any kind of Eſtabliſhment, the *dernier* reſort, and Supremacy of Power, is always in the People. Which is a Notion that would unſetle all Governments, making them precarious. Whereas he himſelf tells us, 'No Government can be legally, or by any lawful Power chang'd, but muſt remain for ever, once eſtabliſh'd.

Mr. Hunt *p.* 122.

CHAP.

CHAP. IV.

That even according to Mr. Hunt's *Notion of Tenure in* Capite, *all Proprietors of Land, as ſuch, had till the* 49th *of* H. 3. *right to come to Parliament.*

THis, though never ſo ſtrange, I think will be granted me, that he does, if he makes all the Freeholders of the Kingdom Tenants *in Capite per Baroniam.*

He ſuppoſes, that the 'whole Kingdom 'was upon the matter turn'd into one great 'Mannor by *William* the Firſt (all Men 'made his Tenants) And that all the great 'Poſſeſſions (by which he muſt mean the 'Mannors, of which others held) were 'made *Baronies.* *Ibid.* p. 131.

Now this, 'Feudal Baronage, he 'ſays, was capable of being multiplied ſe- 'veral ways: For every part of the Fee, 'however divided, the *Services* reſerved 'upon that Fee, that were *entire* and *indi-* 'viſible, were to be performed by the ſeve- 'ral Proprietors of the ſeveral parts of the 'divided Fee. *Page* 129. *Page* 163. *Page* 164.

Since he uſes this as a Proof of the Multiplication of *Baronies*, according to the Argument, *Baron-Service* was *indiviſible.*

Thus

Thus every Proprietor, as he had part of the *divided Fee*, was part of the *Baronage*, and conſequently, 'If all the Baronage 'both Spiritual and Temporal *de jure*, ought 'to have Summons now to Parliament, 'without reſpect to Eſtate or Tenure, there would be a great many Pretenders.

Page 173.

But to be ſure, when all the *Baronage* were ſummoned antiently, theſe inferior Tenants came, by his own Rule, as owing *the Service of Barons*, and ſo *ratione Tenura*, were *Barones Regni*.

But the *Baronage of England* having been always, in his Opinion, *the Lords Spiritual, and Temporal*; *and Nobility* having been *Feudal*, or becauſe of the Feud; the Burgeſſes, being all, according to him, *till about the time of* H. 3. *under Tenure by Baronage*, were as good Lords as the beſt; And why were not honeſt *Free-holders* ſo too, as well as Traders, moſt of them, then 'tis likely, Mechanicks?

Page 2.

Page 179, & 180.

CHAP.

CHAP. V.

Whereat he would ſet aſide the Queſtions of what the Government was, till 49th of H. 3. as impertinent. (1.) *His own Notion, by which he would ſupplant the Labours of others, deſtroys it ſelf, while mine maintains what he aims at.* (2.) *He puts ſuch matter in Iſſue for aſſerting the preſent Government, as can never be maintained.* (3.) *He yeilds ſo much of the Fact againſt me as ſets aſide the whole Foundation of his* Poſtſcript. *And yet admit he anſwers all Objections againſt his* Poſtſcript, *the Grounds which I go upon are of the moſt General Uſe.*

'FOr preventing the Worlds being troubl'd with impertinent Labours, and to divert thoſe that thus employ themſelves to Undertakings more uſeful to the Publick, & advantagious to themſelves, he thought fit to tell us, that *the Parliament was always materially the ſame.* Page 156.

But we are at a loſs to know what he means, by *materially the ſame.*

For 'tis manifeſt, that according to his Notion, if the Government were from the time of our Diſpute always in one, it would have been *materially the ſame*, as 'tis now, and yet he will not allow the Legiſlative Power to be in one here. 'Every Govern- Vid. Poſtſcript
'ment, ſays he, is the Repreſentative of p. 28.
'the People in what they are to be govern-

'ed by it, by their consent to it, in the first
Mr. Hunt, p. 155. 'erecting thereof, they do trust their Go-
'vernours with the Rule and Order of their
'Lives and Estates for the Common-Weal.
This seems to be his meaning of *materially the same*, as 'tis brought to shew that 'tis not needful, in order to the maintaining the present right of the Commons, 'to shew, 'That the Counties in all this time had their 'Representatives in Parliament, by the for-'mality of a Choice. Which no Man, that I know of, has of late laboured to prove.

But if this be his meaning of *materially the same*, then all Governments are *materially the same*; Whereas they may be so formally, as founded in the consent of the People, which he presupposes.

But if *William* the First was an *absolute Conqueror*, as he all along yeilds to Dr. *Brady*, where was the consent of the People to his Government? And how can a Government by consent, now of constituent parts, different from what he thinks ours was at the first Erection by the *Conquest*, be either *materially* or *formally* the same with such a Government by Conquest?

Page 148. But we must seek further for his meaning in *materially the same*. He tells us, the *Parliament* and the Curia Regis, were *materially the same*, that is, as one would think there, consisted of the same Members, the only difference being laid to be in the nature of the Summons. And yet he tells us,

tis, that the *ancient Burroughs ſent Members to Parliament*, but that ſuch were not *Suitors* to the Curia Regis: How then were theſe *materially the ſame?* Page 151.

Thus 'tis plain that he has laid no manner of Foundation for our Government by *King, Lords*, and *Commons*, or by *King*, and *three States* (which he takes to have been the Eſſentials of our Government from the Conqueſt) but what himſelf undermines. Whereas what I go upon prevents all manner of Pretences for unhinging of it, and is the ſame in effect with what the *Great Forteſcue* obſerved in the time of *H.* 6.

Et in omnibus Nationum harum, & Regnum earum temporibus, regnum illud eiſdem quibus jam regitur conſuetudinibus continuè regulatum eſt, quæ ſi non optimæ extitiſſent, aliqui illorum juſtitiâ, ratione, vel affectione concitati eas mutaſſent. *Forteſcue* de Laudibus Legum *Angl.* f. 38. b.

Indeed this Aſſertion, of that famous *Chancellor*, has been much exploded by thoſe, who think that the altering of ſome Laws, or Cuſtoms, is a change of the Government; And therefore ſay, that he was greatly miſtaken, becauſe many old Cuſtoms have been aboliſh'd: Whereas he certainly meant it of the Fundamental Conſtitution. Which, as far as ever I could learn, was, and is, that every *Proprietor* (of *Land* eſpecially) ſhould in the *General Council* of the Kingdom, conſent to the making thoſe Laws under which they were to Live.

Vocatio & Congregatio Populorum & Gentium omnium qui ibi omnes convenire debent, & universi qui sub protectione & pace Domini Regis degunt & consistunt in Regno prædicto, & ibi providere debent indemnitatibus coronæ regni hujus per Commune Concilium & ibi providendum est ad insolentiam malefactorum reprimendam, &c. Leges Sanct. Ed. de Greve. Vid *Jus Angl.* ab *Antiq. Cap.* 7. *Dr.* Brady *says, the Controversy is concerning matter of Fact only. Against* Jan. Angl. facies nova. *p.* 1.

In the time of the *Confessor*, as appears in the Transcript of his Laws, there was a *Folcmote*, or *General Assembly* of the People of all the Counties of *England*, which was to be held once a Year on the *Kalends* of *May*, to treat of all Matters of State and Publick Concern: the very Law for such Assembly was received and confirmed in the *4th* of *William* the First. So that then by Law, and of Right, whatever was the *Fact*, the People of all the Counties of *England*, that is, all the Members of the County Courts, the *Free-holders*, were to meet in a *Great Council*, or *Parliament*, as we now call it.

* *Sym. Dunel. f.* 243. *Anno* 1121. So *Mat. West. f.* 252. 37. *H.* 3.

† Ego enim quando voluero faciam ea satis summoneri propter mea dominica necessaria ad voluntatem meam *Jan. Angl. p.* 34. Spelm. Glos. tit. Hund.

Admit that this is to be taken of every County respectively, (which were to make as many distinct Governments as Counties): still the * *Adunatio Conciliorum*, or, Calling † together of the Counties and Hundreds, as often as there was need, which *H.* the *1st* promis'd by his Charter, would come to the same thing.

Vid. *Additions to* Jus Angl. ab antiquo *a p.* 20. ad *p.* 32.

And that all the Members of the several County Courts, were Members of the *Great* or *General Council*, and came accordingly if they

they pleaſed. Not to mention the ſeveral Authorities by me formerly inſiſted on, I conceive may appear by comparing two Authors of undoubted Credit and ſufficient Antiquity, who ſhew what the *Great Council* was in the time of *Henry* the ſecond.

In the 16 of *Henry* the ſecond, that King held his Eaſter Court Baron at *Windſor*, as *Bromton* ſhews us, **Rex tenuit Curiam ſuam** *in ſolemnitate Paſchali.* Thither indeed were flock't moſt of the Nobility, *fere omnes Regni Angliæ Epiſcopi, & Magnates.* Brompton, *f.* 1060.

But this being a *Curia de more*, or an ordinary Court, which no more than Tenants in Chief were obliged to take notice of, nothing of univerſal Obligation could then be Eſtabliſh'd: Wherefore from hence the King went to *London*, where, as that Hiſtorian ſays, *de Coronatione Filij ſui Henrici majores & Regni ſui Statutis magnum celebravit Concilium.* *Gervaſius*, who lived in that very time, acquaints us particularly with the Summons, and Appearance thereupon, *Convenerunt die Statuto ex mandato Regis ad Londoniam totius Angliæ Epiſcopi, Abbates, Comites, Barones, Vice-comites, Præpoſiti, Aldermanni, cum ſuis de ſuſſorjibus ſuis.* Brompton, *An.* 1170. Gervaſii Crodica, *f.* 1412.

There aſſembled at *London*, according to the King's Summons, the Biſhops, Abbots, Sheriffs, the *Heads of Hundreds, and of Tythings*, with all the **Frank-pledges** throughout *England*; unleſs the *Fidæ-juſſores* Anſwer to the *Manucaptores*, of which immediately. *This Explanation is warranted by St.* Edward's *Law*. Hubert etiam

diately. If this take not in all the *Free-holders* of *England*, I know not what will; for he that was within no free-pledge, or was no Fide-jussor, was either an Out-Law, or not his own Man, but his that was to be answerable for him: But every Master of a Family, or * Free-holder, that was within the Protection of the Laws, was one of the *Frank-pledges*. And indeed *Bromton* tells us in express Terms, that all the Libere sui Regni tenentes, all the *Free-holders* of the Kingdom were there, for they all swore Allegiance to the young King, as well as to the Father.

Aldermanni in Civitatibus & in Burgis clausis & muræ vallatis, & in Castellis eandem Dignitatem & Potestatem, & modum qualem habent *præpositi* Hundredorum & Wapentachiorum. *Vid.* Spel. *Glos. Tit.* Aldermannus.

* Jus Angl. ab antiq. *p.* 192.

Omnes Comites, Barones, & liberos Regni sui tenentes devenire homines novi Regis Filij sui sibiq; super reliquias sanctorum Ligeantias & Fidelitates jurare, Fidelitate semper nihilominus suâ salvâ.

Bromptor, *f.* 1051.

But if the *Fidejussores* mentioned in *Gervasius* were no more than the *Manucaptores*, which used to answer for the Appearance of them that were chose to represent the Counties, Cities, and Boroughs in *Parliament*, then here is positive proof of such Representation of the *Commons* as was in the times of *Edw.* I. *Edw.* II. and so downwards. Yet 'tis not improbable that the Pledges, or *Manucaptors* for the Knights, Citizens and Burgesses chose to parliament, were introduced long after this time instead of the *Fidejussors*, or *Frank-pledges*, when that admirable ancient Polity about Frank-pledges became impracticable, and was

Ex Blundel Brev. penes Rem. R's in secio, 23. *E.* 1. *North* Nomina duorum mil. Johannes Doyley de Stoke miles Willus Murdake miles Manucaptores Johannis Doyley mil. *Ric. Bird* de Stoke Williel. Ellis de eadem. *Many more of like nature.*

was discontinued or broken through the general Corruption of Manners, which rendred it impossible for whole Neighbourhoods to answer for one another, and through the Pride and Ambition of some who thought themselves above that Law.

Francus Plegius seu Fidejussor *Spelm. Glos. Tit.* Franc. *pl.*

And when the numbers of *Frank-pledges*, (had that happy Combination still been maintained) would through the vast Multiplication of *Proprietors* have been too great to assemble together upon any Occasion requiring Counsel and serious Debates.

There is one Difficulty which arises upon the examining this point of Antiquity; that is, since we rarely meet with Authorities, tho some there be, which particularly describe such as Citizens and Burgesses as summoned to, or present at the *General Councils of the Kingdom*, What shall we think of them.

So nono H. 3. Milites & libere tenentes & *omnes* de Reg. Magna Charta *cap.* 38. 2 *Inst.* f. 76.

To which I am bold to say, that even *Citizens* and *Burgesses* might have come under the Consideration of Free-holders, *inter liberos Regni tenentes*, or, *Barones*, *Baronagium*, *Barnagium*, or the like.

For either they were; 1. Corporations by Charter; Or, 2. Corporations by Prescription. And I think it will be probable at least, that Property in Land, the continuance of which in any Family made Nobility, was the occasion of the Priviledges of them all. And in such respect the *Freemen* there were numbred amongst the *No-*

Spelm. Glos. Tit. *lib.* hom. ad Nobiles olim spectabunt isti titulis a majoribus ortos omnino liberis.

bles, tho afterwards when Trade prevailed amongst them, the Generality of them might be but *quasi optimates*, and yet by Custom, they obtained the name of *Barones*, as in *London*, *Warwick*, the five Ports, *&c.* And probably upon the account of the first Erection.

Vid. Camden's Ordines Angl. *f.* 122.

But that I may not talk wholly at random, I shall offer a Scheme of the ancient Polity, in relation to them which at least will not be disproved.

For the first, the Corporations by Charter, they were of two kinds.

(1.) Such as were incorporated by the King.

(2.) Such as were incorporated by the Subject.

1 *Inst.* f. 110 b. 1. Of those that were incorporated by the King there were *Cities*, that is, *Boroughs*, which had a Bishop's See, or else *Boroughs* only. But the Episcopal See, making the only difference, they fall not here under any different Consideration.

I conceive that though to these at the time of the Incorporation, the King granted several Franchises, as Markets, Fairs, and the like: Yet he gave no Right of sending Members to Parliament, to them who had it not before: but of them that were so incorporated, some were *Minores tenentes in Capite*, inferiour Tenants in Chief, such as by King *John*'s Charter were (where not incorporated) to be summoned in general to the *Commune Concilium*,

cilium, or *Curia Regis*. Many of these for the ſake of ſuch Immunities as belonged to free Boroughs, conſented to be incorporated: and thereupon they being one entire Body, naturally fell into a Repreſentation, and anſwered together by their Head-boroughs, or any other that they choſe, as one Tenant.

St. *Albans* I take it was of this kind, the Burgeſſes of which pleaded, that they held the ſaid *Vill* of the King *in Capite, & ipſi ſicut cæteri Burgenſes Regni ad Parliamenta Regis cum ea ſummoneri contigerit per duos comburgenſes ſuos venire debeant prout toto retroacto tempore venire conſueverunt pro omnibus Servitiis Regi faciendis, quæ quidem Servitia iidem Burgenſes & Anteceſſores ſui Burgenſes Villæ prædictæ tam tempore Domini Edwardi nuper Regis Angliæ Patris Regis & Progenitorum, quam tempore Regis nunc ſemper ante inſtans Parliamentum ut præmittatur præſtiterunt Nomina quorum Burgenſium ſic prædictæ Villæ ad Parliamenta Regis venientium in rotulis Cancellariæ ſemper irrotulata fuerunt.* Rot. Parl. 8. E. 2. N. 233.

I before had occaſion to examine Dr. *Brady*'s Interpretation of the Anſwer to the Plea; here the Plea it ſelf comes to be conſidered: And whereas he renders *pro omnibus Servitiis*, *in lieu* of all Services, I conceive the Senſe to be no more than thus: Dr. Brady *against* Mr. Petyt, *p.* 78.

That they held of the King in Chief, and that as other Burgeſſes of the Kingdom, they

they were to be repreſented at the King's Parliaments, when they happened to be ſummoned by two of their fellow-Burgeſſes, as ever ſince they were incorporated, they had uſed to come, for the performing of *any of their Services*. And that they had not forfeited their Charter, nor ought their Corporation to be diſſolved, for that they had duly performed all their Services. And for proof that, to Parliament eſpecially, they had all along come by Repreſentation, they appeal to the Rolls of Chancery.

So if ſummoned to attend the Juſtices in Eire, or the like.

Certainly, no Man, before the Doctor, thought that the coming to Parliament excuſed any Rent or other Service, which was incumbent upon them.

But thus much is obvious from this, that here were *Minores Barones*, Tenants in Chief (whoſe Tenure muſt have been created by Charter) who were fallen into a Repreſentation: And that this was upon the account of Property in Land, which occaſioned their Services, and their being united as one Tenant.

But beſides theſe, there were Tenants of *Honours* or *Manors* in the King's Hands, or in the Subjects, which were incorporated by the King's Charter, and ſent their Repreſentatives to Parliament.

I ſhall inſtance only in a Corporation holding of a Subject, but incorporated by the King's Charter.

King

King *John* by his Charter to *William Brewer*, who in all likelihood was Lord of the *Manor* of *Brugwater* or *Bridgwater*, grants that *Brugwater* ſhould be a free *Burrough*, and that it ſhould have *Markets* and *Fairs*. And 26 of *Edward* the firſt, when the firſt Roll of Burgeſſes begins, we find Burgeſſes for *Bridgwater* entred amongſt the reſt.

Pro Burgenſibus de Brugwatr ut ſit liber Burgus per Charam Regis Johan. factam Wi. Br. Cart. 11. *Ed.* 1. *m.* 5. *n.* 20. *Cart.* 11. E. 1. *m.* 5. *n.* 13. *Vid.* Prin. *Regiſt. of Writs.*

And 'tis obſervable, that there is not to be found any Charter giving them the priviledg of ſending Burgeſſes, nor could ſuch a Priviledg ariſe by Implication. Wherefore they muſt neceſſarily have come upon the account of their Property in Land, with no other Alteration than that their divided Intereſts were all conjoyn'd in one.

2. But beſides theſe, there were ſome incorporated by Subjects.

Of thoſe who incorporated them, ſome had *Regalia* themſelves, as the Counts Palatine of *Cheſter*: One of which *Leofrick*, Brother to the Confeſſor, in his life-time, incorporated *Coventry* under the Prior and Monks of *Cheſter*. Whereupon the Burghers of *Coventry* were repreſented in the *General Councils* of the Kingdom as one entire Body. We find that it ſent Burgeſſes to Parliament 26 *Edw.* 1. and from its firſt Corporation muſt needs have done ſo, according to its Plea which was allowed 34 *Edw.* 1. For it pleads that it was neither *Civitas*, *Burgus*, nor *Dominicum Regis.*

Inter Coima de term. St. *Mich.* An. 34. Edw. 1. *vid. pars of it enfore't* Jan. Angl. *p.* 241.

Regis. That therefore it ought not to be taxt or taliated as ſuch, but was to be charged only when the whole County was charged, or in the like Proportion: and they pray that the Taxors and Collectors may not be ſuffered to diſtrain amongſt them, otherwiſe than it had been, *totis retroactis temporibus* in all times paſt, ſince they became one Body; that is, that ever ſince they were a Body, they us'd not to be taxt as the King's *Demeſnes*, whether Cities, Boroughs, or Manors (which might be out of Parliament, and even when there was a Parliament, they bore the heavieſt Burthens): But as the County, as to the way of charging, or at leaſt as to the Proportion, but they having been at Parliament 26 *E.* 1. which was but eight Years before by Repreſentatives of their own, not of the County in general, it ſhews how they had been taxt, *totis retroactis temporibus.*

Vid. at the end this inſerted at large.

¶

Vid. Prin's *Regiſt.*

But beſides the Charters of Counts Palatine erecting Corporations, there were others granted by ſome, who were particularly impowered to that purpoſe, or however they might have been confirmed by the King afterwards.

But I ſhall give an Example of a Corporation raiſed by virtue of ſuch a Power given by the King, and confirmed afterwards.

Thurſti-

Thurſtinus Dei Gratiâ ſciatis me dediſſe, & conceſſiſſe, & Concilio Capituli Eborac & Beverlac & Concilio meorum Baronum *meâ Cartâ confirmaſſe hominibus de Beverlaco omnes libertates iisdem legibus quibus ulli de Eborac habent in ſuâ Civitate, præterea enim non lateat vos quòd Dominus* H. *Rex noſter conceſſit nobis poteſtatem faciendi de bonâ voluntate ſuâ, & ſuâ Chartâ confirmavit Statuta noſtra & Leges noſtras juxta formam Burgenſium de Eborac.* &c. Charta Antiqua *R. n.* 18. Hen. I.

H. *Rex Angliæ*, &c. *Sciatis me conceſſiſſe, & dediſſe, & hâc Chartâ meâ confirmaſſe Hominibus de* Beverlaco liberum Burgagium *ſecundum libertates, Leges, & Conſuetudines Burgenſ. de Eboraco, & ſuam gildam Mercatorum cum placitis ſuis, & Feloneo & cum omnibus liberis conſuetudinibus, & libertatibus ſuis, cum omnibus rebus ſicut, Thurſtinus Archiepiſcopus ea iis dedit*, &c. Carta Ant'q. *R. n.* 15.

There is another Confirmation by King *Henry* of the Charter by *Thurſtan*, and alſo *William* Arch-biſhop of *York*, to the ſame *free-Borough*: Ibid. *n.* 16.

And alſo another of King *Richard*, wherein he mentions the Confirmation of the Biſhop's Charters by his Grand-Father. Rich. I.

Tenentes de Villâ Beverlaci *in auxiliis, tam Regi, quam Primogenitoribus,* cum Communitate *prædict* Comitatus *ſemper hactenus & non cum Communitate Civitatum & Burgorum taxari & contribuere conſueviſſe.* Inter Brev. dir. Baron de Term. S. Trin. 8 Ed 2. penes Rem. D. Theſ. *This like* Coventry.

I need not go to prove that these came by reason of their Property in Land, they being either the Kings Tenants, or the Tenants of Subjects. And whatever Priviledges their Interest might prevail with them to suffer to Tratlers amongst them, 'tis certain they were granted to the *Freeholders*.

2. But then there were Corporations by Prescription, where since now all the Freemen chuse, it may seem more difficult to prove that they came up n the account of Property in Land.

Many of these received Charters in Confirmation of their Priviledges, yet, if they were taken away, would remain good Corporations at the Common Law. I may instance in *London*; of which there is this memorable Passage in the Confessors Laws.

Leges Sanct. Ed. de Hertford.

Debet etiam in London *quæ caput est regni & legum semper Curia Domini Regis singulis septimanis die Lunæ Hustingis sedere & teneri.* And amongst other things *quæ huc usque* consuetudines suas una semper inviolabilitate conservat.

King *John*'s Charter provides for the ancient Liberties, and free Customs of the City of *London* in particular, and of all other *Cities*, *Burroughs*, *Vills* and *Ports*, and some Charters of other Kings may seem more like new Grants than Confirmations of the old Priviledges: But thus much is certain, that those *Cities*, *Boroughs*, and *Vills* which had their Liberties, and free Customs confirm'd

firm'd by *Magna Charta* 9. *H.* 3. which was in the ſame Terms as to that part with King *John*'s, were *Cities*, *Burroughs*, and *Vills* at the Common Law. And that we may frame an Idea of theſe, we muſt have recourſe to the old *Saxon* Laws.

By them it ſhould ſeem that there was a greater equality amongſt the *Maſters of Families*, than afterwards, and the Law of *Frank-pledges* was well ſuited to ſuch equality; when no Man was above giving that Security to the Government, upon which St. *Edward*'s Law ſays, *Eſt quædam ſumma & maxima Securitas, per quam omnes Statu firmiſſimo ſuſtinentur ut unuſquiſque ſtabiliet ſe ſub fidejuſſionis Securitate.*

Habeat omnis Dominus familiam inplegio ſuo *L. Canuti. c.* 52.

L. Sanct. *Ed.* de *Friborgis.*

And as every *City*, or *Burrough* was a *Vill*, that being the *Genus* to both as well as an inferior *Species*, the Law provided *quod de omnibus Villis ſub decimali fidejuſſione debebant eſſe univerſi*, of theſe *Vills* they that had ſpecial Priviledges, Markets, Fairs, and the like, were *free Burroughs*. And as the *Vills*, ſo the *Burroughs* at the Common Law were made up of a certain number of Free-men, whoſe Property might extend far into the Counties. Theſe at firſt were under Tythings. Afterwards as in the time of *H.* 1. Property falling into more Hands within the ſame Tract of Land or Precinct, we find them anſwering for one another by Twentys, the Headburrough was *Aldermannus*, or *Præpoſitus Villæ*, or *Burgi*. Every one of theſe as a *Fidejuſſor*, I take it, came ancient-

Vid. Jus Ang. ab antiquo, *p.* 13, 14, 15. L. de *Friborg.*

Aldermannus novemdecimorum *in the Laws of* H. 1. Spelm. *Gloſ. Tit.* Aldermannus.

anciently to the *General Council* of the Kingdom in his own Person if he pleas'd: But very frequently they might intrust their *Aldermannis*, or Headburrough, to answer for them. But the *Franck-pledges* discontinuing, they might accustom themselves to electing of Members, sometimes one, sometimes more, upon every Summons to Parliament; And thereupon in every Burrough at the Common Law, the Elections are by all the Free-men, which answer to the *Franck-pledges* formerly, except that 'tis likely of Old all the *Franck-pledges* were very considerable *Free-holders*.

But still these *Burroughs* could not take in all the *Free-holders*, nor yet the *Vills*, as anciently, consisting of clusters of Inhabitants. But if any Man grew wealthy, he loved to live by himself in some Castle, or large Seat which he might build abroad in the Country. Such look'd upon themselves to be too great to give Sureties for their good Behaviour, as those that liv'd in Clusters did: And by the time of *Edw.* the First *Chivalers* and their Children, (And I take it, every considerable *Free-holder*, was a *Chivaler* or Gentleman,) were exempted from the Law of *Franck-pledges*. Doubtless every one of these, as the *Possessionati* in *Poland*, came to the *General Councils* in Person.

Britton c. 29. p. 72. b. Vid. *Stat. West.* 1. c. 10. 3. E. 1. *the Coroner to be* des plus loialz & plus sages *Chivaliers*. Vid. etiam *Jan. Ang. Facies nova* p. 47. & 48.

As the Lands were further improved, and a free increase of Natures Stores made Men luxurious, Great Men put themselves into Straits, and were often obliged to sell their

their Inheritances, and to manumit their Servants, or release Servile Tenures, and the Off-spring of these who themselves were *Cheorls* or *Pesants*, were, according to the *Saxon* Law, which probably enough continued long after the *Norman*'s Acquisition, enobled, or became Gentlemen by the Descent of five Hides of Land to the third or fourth Generation.

Et si *Cheorlman* removeatur ut habeat quinque hidas terræ, &c. Et si Filius Filii ejus hoc assequatur ut tantum terræ habeat postea est qui nascetur ex eis sithercunde Generationis, &c. Leges *Aldistani Bromton* f. 846.

Thus, together with the divisions of Lands amongst the several Children of great *Proprietors*, and subdivisions downwards, as the Families branch'd out, the Numbers of *Free-holders* became by King *John*'s time little less than infinite, *tota regni Nobilitas quasi sub numero non cadebat*. And this sort of Nobility, for the most part to be sure, look'd upon themselves to be above Citizens, or Burgers, and scorn'd to be within *Frank-pledges*, and be *bound with Sureties to their good Behaviour*. (Which Dr. *Brady* tells us (and rightly enough, if he speak of the Time of *Edw.* 1.) was only for *the ordinary Free-men, or the Bulk and multitude of the Free-men, or small Free-holders.*) All that look'd upon themselves as Gentlemen, at the least, were without any manner of Representation; and wherever they were interested, appeared in Person, and sometimes in very disorderly Multitudes. Some sensible of the inconvenience of it, and expence and trouble to themselves, of their free Choice became incorporated by Charter as aforesaid, being either the Kings Tenants, or some infe-

Matth. Paris *Edit.* Tig. f. 246.

Dr. Brady's *Glos p.* 31.

riour Lords, or it may be the Tenants of ſeveral Mannors joining together, and their coming to Parliament, or as the Burrough of St. *Alban*'s pleads, *pro omnibus ſervitiis faciendis*, was a conſequent upon their Incorporation.

Free-hold, I take it was the occaſion of all this, though afterwards Traders might be admitted to Priviledges amongſt them. The Traders and Free-holders within Cities or Boroughs ſent their Delegates, whilſt here, as in *Poland*, the *Poſſeſſionati*, Men living upon their Lands in the Counties, came to the *General Councils* in their own Perſons. Thus it was here till the 49*th* of *H.* the 3*d*, as I think the Authorities formerly inſiſted on by Mr. *Petyt* in behalf of the Citizens and Burgeſſes, and by me for the *Poſſeſſionati* in the Counties, ſufficiently Warrant.

Vid. ſupra.

Vid. Jan. Ang. facies nova *p.* 66.

Wherefore the Alteration which was made in the Government in the 49*th* of *H.* the 3*d.* if any were then made, was the calling out ſome of theſe *Proprietors*, Barones Comitatus, to come in their own Perſons, and putting a *Repreſentation* upon the reſt, which was moſt likely to be done by the Perſwaſion and Influence of the King, though with the conſent of the People; And therefore I muſt ſay, 'tis moſt probable that what is by Mr. *Cambden*'s Author tranſmitted to us, as done a little before the Death of *H.* the 3*d*, muſt have been ſome years after the 49*th*, and the Kings Victory at *Eveſham* over the *Great Barons*, whom he curb'd by the

Jan. Ang. *&c.* *p.* 263.

Additions to Jus Ang. *p.* 20. Vid. *Mr.* Selden *Obj. againſt this anſwered.* Jan. Ang. *a p.* 250. ad 256.

the *Lefs*, the *Commons*; Which prevail'd on his ſide, by whoſe Aſſiſtance he depriv'd many great Men of a judicial Power in *Parliament*, and of the right to ſpecial Summons, while the *Commons* had their Power preſerved in their *Repreſentatives*, they were all intereſted in the Legiſlature as before. But all the *Great Barons* had not their former Intereſt in the Supream Judicature, and yet this variation in reſpect of the Great Lords, was no change of the outward *frame of the Government*, but only a diminution of the Priviledges of ſome particular Men. And though the bringing in Repreſentations, where no Repreſentations were before, altered the *Frame*, and Appearance of the Government; yet it did not the Conſtitution and *fundamental* Intereſt of *Proprietors of Land*, with whom the Ballance of Power has ever been in this Nation; the Foundation is and was the ſame, like the ſame Soul animating the ſame Body, when 'tis greater, and when by reaſon of Tumults and Seditions, as we may call them, in the Spirits, 'tis waſted from its Corpulency, and thereby often brought to a more aſſured ſtate of Health than ever before.

This more healthful State in a contracted Body of *Proprietors of Land*, I yeild to have been ſetled in the Reign of *H.* the 3*d*. It happening that there were Writs to that Purpoſe, juſt in the 49*th* 'tis concluded that then it was firſt begun; Whereas by the ſame Argument 'twas in the 38*th*, when

two for every County were ſummoned to Parliament *Vice omnium & ſingulorum*. But if I ſhould confine my ſelf to Authorities within the time of the firſt *Edward*, immediate Succeſſor to *H.* the 3*d*, I doubt not but there were enough to ſatisfy any unbyaſs'd Reader, that the *Commons*, ſuch as are now *repreſented by Knights, Citizens and Burgeſſes*, had before the 49*th* of *H.* the 3*d*, *Shares or Votes in making of Laws for the Government of the Kingdom, and had communication in Affairs of State*, otherwiſe then as *repreſented by the Tenants in Capite*, notwithſtanding Dr. *Brady*'s *Affirmation* to the contrary.

Rot. Clauſ. 38. H. 3. *m* 7. & 12.

Jani Angl. &c. *p.* 244

Dr. Brady *againſt Mr.* Petyt. *p.* 1. & 2.

In the 24*th* of *E.* 1. the Earls, Barons, Knights, and *others* of the Kingdom, which *others* was then, and afterwards, meant of the Commons of the Cities and Boroughs, gave a Subſidy, *Sicut aliàs nobis & progenitoribus noſtris Regibus Angliæ.*

Rot. Pat. 24. Ed. 1. N. 22. Jus Ang. *p.* 160. *Stat. Stap.* 27. Ed. 3.

And ſure *Hen.* the 3*d* could be but one Progenitor, ſo that the **Barones Minores, the Free-holders of Land**, (which ever ſince the 49*th*, or ſome other Year of *Hen.* the 3*ds* Reign, were repreſented by the Knights of the Counties, (who were not in thoſe times to be ſure confined to Knights by Tenure or Dubbing) And the Commons of Cities, and Burroughs, at the leaſt from within the Reign of King *John*, to whom *Hen.* the 3*d.* immediately ſucceeded, *were Members of Parliament*, being Parties to Grants there made. And omit-

omitting the Preſcription of the Burrough of St. *Albanes* from within the time of the *Progenitors* of *Edward* the firſt, to uſe but one Authority not mentioned in either of my Tracts.

Rot. Parl. 8. Edw. 2. *n.* 213. *See that Record vindicated from Dr.* Brady's *Miſconſtruction*, Jus Ang. ab antiq. *p.* 28, 29, 30.

In the 28 of *E.* 1. the *Knights*, *Citizens*, and *Burgeſſes* had been ſummoned to the Parliament at *Weſtminſter*; *Nobiſcum de diverſis negotiis nos & Populum Regni ſpecialiter tangentibus tractatur*: and Writs iſſued out for their reaſonable Expences, *prout alias conſuevit in caſu conſimili.*

Rot Clauſ. 28. E. 1. *m.* 12. dorſo.

1. Upon which 'tis obſervable, that *de quibuſdam arduis*, which is now in uſe in the Writs of Summons, ought not to be reſtrained to a few great matters, but extends to *divers*, according to the different natures of matters brought before, or appearing to them.

2. That the *Commons* had not only an Aſſent without power of diſſenting; but they were to *treat* as well as the *Peers.*

(3.) That their coming was not a new thing then, as if begun but 35 Years ago, in the 49*th* of *H.* 3. but it was of Cuſtom, and legal Preſcription, ſo far that it laid an Obligation upon the Subject to contribute to theſe Expences; and ſurely an Uſage of 35 Years would not be a ſufficient Charge in Law.

4. That though there is no Evidence that *Repreſentations* for *Counties* were ſettled before the 49*th* of *Hen.* 3. Yet the Free-

holders were often at *Parliament* by *Representation*, and thence there was ground in reason to occasion the Custom that they should bear the Charges of them that they chose: Nay, if there were no actual Choice, there was tacit Consent, (from which Custom may arise) that those who were willing, and at leisure to be at *Council*, should answer for, and have Contributions from the rest. But let both Dr. *Brady* and Mr. *Hunt* consider the Precedents above mentioned, of *Coventry*, and *Bridgwater*, which did not hold of the King, and yet sent Burgesses to Parliament; and let them give a categorical Answer, whether they believe that the *Majores Barones Regni*, and *omnes alij* holding *in Capite*, mentioned in King *John*'s Charter, *made* the Parliament till the 49*th* of *H.* 3.

Mr. Hunt, p. 149.

This I think may be enough to satisfy any reasonable Man, that the Government was the same before the 49*th* of *H.* 3. that 'twas after, and that it had not its Rise from Rebellion, nor yet from *Conquest*, or Usurpation; but from a Consent binding on both sides.

Contrary to Dr. Brady, against Mr. Petit, p. 210.

And thus I have shewn (which Mr. *Hunt* does not) that our Government exactly answers his Rule or Idea of a lawful Government, which he says, *Is the Representative of the People in what they are to be governed by it, and by* their Consent *to it; in the first erecting thereof they do trust their Gover-*

Page 155.

Governours with the Rule and Order of their Lives and Eſtates, &c. But,

2. He puts ſuch Matter in Iſſue, for aſſerting the preſent Government, as can never be maintained.

That *William* the firſt made no *Conqueſt* of *England*, and that the Intereſt of the *Commons* in *Parliament* did not begin by Rebellion in the 49*th* of *H.* 3. have been thought good Mediums to ſettle the Foundations of our Government. Mr. *Hunt* indeed looks upon all *Labours* to this purpoſe as *impertinent*: But this he ſays is certain, *That whatever thing of Government is introduced by the Conſent of the Prince, and that Alteration aſſented to and embraced, avow'd, and own'd by every Man of the Community, by Actions, and other open Declarations of a full conſent; and this continued for Centuries of Years, and in all that time applauded, and found agreeable to the Intereſt of the Prince, and People, and the old Government aboliſh'd and impracticable, the very matter of it ceaſing, and it become a thing impoſſible, as well as not deſirable to reſtore it. I ſay, whatever Conſtitution is thus introduced, and eſtabliſh'd, is as unmoveable as unalterable, (or no Government is) as if it had been ever ſo.* Page 156. Pag. 154, 155.

Wherefore, to ſhew that our Government was ſo introduced and eſtabliſh'd, that it ought not to be altered, according to him, we muſt prove every one of theſe following Particulars.

1. That admitting a *Conqueſt*, and that the *Commons* came into *Parliament* by rebelling againſt the Heir of the *Conquiror*; yet they were introduced by the legal *Conſent of the Prince*.

2. 'That this Conſtitution was aſſented 'to, and embraced, avow'd, and own'd by 'every Man in the Community, by Actions, 'and other open Declarations of a full 'Conſent.

3. 'That for Centuries of Years this has 'conſtantly been applauded, and found 'agreeable to the Intereſt of Prince and 'People.

4. That though there were a Conqueſt, yet the Right of *Conqueſt* is aboliſhed.

5. That the exerciſe of a Government according to ſuch a *Right*, is become *impracticable*, *impoſſible*, and not *deſirable* by any.

6. That the very *Matter of it ceaſes*.

I may well without further inlarging, conclude this Head with his own words.

Page 154. *If our Government muſt take its Fate upon ſuch Iſſues as theſe, I am ſure we ſhall not long hold it.*

3*dly*. But then he yields ſo much of the Fact put in Iſſue by me, as ſets aſide the Foundation of his whole *Poſt-ſcript*; and yet admit he anſwers all Objections againſt his *Poſt-ſcript*, the Grounds which I go upon are of the moſt general Uſe.

That there was an abſolute *Conqueſt* of the Nation by *William* the firſt, and that he

he admitted none to any Shares in the Government, but ſuch as derived their Intereſt from his Bounty, is contended for by many, *Tanquam pro aris & focis.* And tho the Hiſtory of King *William* the firſt his entring upon the Government, is very ſtrong againſt them, and may be the firſt thing conſiderable: Yet from the ſuppoſition that the *Tenants in Chief*, ſuch as were the Suitors at the Curia, made the *Parliament*, where the abſolute Government of the Nation was plac'd, they very ſtrongly may infer a *Conqueſt*. Whereas the Proof of the difference of the Curia Regis, and the *Concilium Pambritannicum*, or Parliament, ſhews that all the pretence of *Conqueſt* is out of doors, and conſequently the Government is ſuch, as now it is by free Conſent on all ſides; not founded on Uſurpation upon the Rights of any, nor is there the leaſt pretence of unſettling what, as the great *Forteſcue* obſerves, has not chang'd with the People, or Rulers. Supra p. 271.

Admit a *Conqueſt*, and the Inheritance which every one claims in the Laws will be maintainable only as a *naked Right*, and *naked Rights* are thin and metaphyſical Notions, which few are Maſters or Judges of.

But *Conqueſt*, or no *Conqueſt*, a Government derived from the Pleaſure of one, or conſented to by all, are Queſtions which any ordinary Capacity is able to judg of, when the Teſtimonies rely'd on by both ſides

ſides are laid before them. And though Matters depending upon Teſtimony, are not capable of Demonſtration, ſo far as they depend upon that; yet where Teſtimonies are made uſe of for the laying a Foundation, upon which ſome Metaphyſical Notions of *Right* are built; it is poſſible to demonſtrate that the Teſtimonies will not ſerve the purpoſe for which they are brought, but are clearly on the other ſide. And if that be done, it wholly ſilences the Diſpute, better than Mr. *Hunt*'s Scheme of *Probabilities*, or his Metaphyſical, nay, or Phyſical Notions of the Right of Fatherhood.

Mr. Hunt, *p.* 205.

If therefore it be ſhewn that there is not the leaſt ſhadow for pretence of a *Conqueſt*, or that only ſuch as derived what they had from the Bounty of the Prince, were intereſted in the Government and Legiſlature, certainly the whole Frame of Conſequences built upon ſuch Suppoſition eaſily falls to the ground.

I appeal to the World, Whether what Mr. *Hunt thought fit to ſay for the preventing the World's being troubled with ſuch impertinent Labours, and to divert thoſe that thus employ themſelves to Undertakings more uſeful to the Publick*, can be of ſuch a general Uſe and Satisfaction, as the deſtroying thoſe Foundations which are laid for a Government not known to our Laws, nor own'd in our ſo well conſtituted, and ſo ancient Frame, the Admittance of which, would

Page 206. *Page* 156.

would root up the very Foundations.

He ſays our Government was always *materially the ſame.* When according to him 'twas neither *materially* nor formally *the ſame* it is now.

Whereas this Labour which he explodes, ſhews that 'twas always both *materially* and formally the ſame, and therefore unalterable.

If there were a *Conqueſt*, that *Conqueſt* eſtabliſh'd a Government, or it did not.

If it eſtabliſh'd a Government, then, according to him, no following Conſent, even of the Conqueror, can diveſt him of any part of that Right which was given by the *Conqueſt*. For upon the Biſhops account, he tells us, 'They cannot be detruded 'from that Place they bear in the Conſti- 'tution of the Government, for that no 'Government can be legally, or by any 'lawful Power, changed, but muſt remain 'for ever, once eſtabliſh'd; and it can be 'no leſs than Treaſon of State to attempt 'a Change: No Authority in the World 'is competent to make any Alteration.

Mr. Hunt, *p.* 121.

Page 122.

If it be ſaid, This is contrary to the Poſt-ſcript, which affirms, 'That nothing 'can be the Concerns of Men united in 'any Polity, but may be govern'd and or- 'dered by the Laws of their Legiſlature 'for their good;

Poſt-ſcrip. p. 33

At

At leaſt this ſhews how in matters of Notion, and *naked Rights*, great Wits may not only differ from others, but from themſelves.

But let us give the Argument raiſed from *Conqueſt*, its full weight, and ſee whether Mr. *Hunt* maintains our preſent Eſtabliſhment upon clearer Grounds than they do who ſearch Antiquity about the Point.

This is begg'd throughout Mr. Hobbs's *pernicious Dialogue between a Philoſopher and Student of the Common Laws of* England.

The abſolute Power and Government of the Nation, was by the right of *Conqueſt* ſetled in *William the Firſt* and his Heirs: this being ſo, could not be parted with.

Power of Kings, *f.* 1.

For it muſt be either voluntarily, or by Compulſion: For the firſt, Sir *Robert Filmer* will tell you, *No Man can bind himſelf in a matter depending of his own Will, there can be no Obligation which taketh State from the meer Will of him that bindeth himſelf.*

Patriarcha *p.* 97.

If by Compulſion, then they will tell you *for the ſame Cauſes that a private Man may be relieved from his unjuſt and unreaſonable Promiſe, as that it was ſo grievous; or, for he was by Deceit or Fraud circumvented, or induced thereunto by Terrour or Force, or juſt Fear, or by ſome great hurt; even for the ſame cauſes the Prince or Princes may be reſtor'd in that which toucheth the diminiſhing of his or their Majeſty.*

If it be ſaid, That this would as well hold in relation to the Peoples parting with that Right which was once in them: they will tell you that no Government can be exerciſed but *Monarchy*; That no other Government is owned by God Almighty, in the New, or Old Teſtament, but *Monarchy*: That while God's People were without a *King* in *Iſrael*, there was Confuſion, and Anarchy. If *Adam* was no *Monarch*, at leaſt *God* himſelf was, and 'twas a *Theocracy*. And therefore admit *Paternal Power* was not *Monarchical*, yet a Man might as well ſeize upon a People without a Government, as upon a piece of Land unoccupied. And when once he became *Conqueror*, he was let into a Divine Right of ordering arbitrarily all things within that diſtrict, and could not depart from it. And though every *Monarch* was not abſolute, (for the Jewiſh Kings were not) yet every *Monarch* by *Conqueſt* muſt needs be ſo, being received without any Conditions, or Limitations.

Now Mr. *Hunt* himſelf, going chiefly to ſhew that Paternal Power was not, as ſuch, abſolute, does not anſwer this Hypotheſis, and the Examination of it depends upon ſuch ſearches into the bottom of things, and the ſhewing them naked in their Metaphyſical Exiſtences, that very few Men can judg

judg of the Controverſy, at leaſt not ſo many, as may, of the meaning of Writers and Records carefully compared together, and in many places freed from all poſſible Ambiguity; but ſtill the more ambiguous they are, the more evidently will they overthrow all thoſe Pretences upon which theſe Notions are built. For if the Records and Hiſtories give ſuch *doubtful Reſponſes*, as Mr. *Hunt* imagines, then indeed we muſt look only to the preſent Government. Whereas if Dr. *Brady*, and his Friends, could ſhew thoſe ancient Authorities to be plainly on their ſide, they would have many that would improve their Notion of the Houſe of Commons their beginning by Rebellion, into an Argument that they ought to be caſt off as Uſurpers upon the Divine Right of the *Conqueror*.

Mr. Hunt, p. 8.

Or at leaſt, yeild but that one Point of the *Conqueſt*, they will tell you agreeably to Mr. *Hunt*'s Aſſertion, that a Government by *Conqueſt* is unalterable by any lawful Power; And, as that is wholly different from a Government by conſent, whatever implies, or admits of the conſent of Subjects to the paſſing any Law, is contrary to the Fundamentals of the Government, and is like a Superſtructure of Hay and Stubble, which ought to be conſumed.

P. 122. ſupra.

Others

Others will tell you that the moſt free Conceſſions of a *Conquering Prince*, or one claiming under that Title, and not departing with his Dominion, can no more oblige himſelf or his Succeſſors in any thing that may reſtrain his Soveraign Will and Pleaſure, than a Man can depart with the freedom of his Will.

And the moſt ſeeming Reſtraints can be no more than temporary Proviſions, or ordinary Methods of Ruling, which the Prince as he found occaſion might remove, notwithſtanding the ſtricteſt Clauſes of Perpetuity, they being of like Interpretation with ſuch Paſſages as related to the continuance of the Jewiſh Law, or Oeconomy, which was to have no place in the *New Heavens*, and *new Earth*.

But if they ſhould yeild that all Grants and Charters, *&c.* are binding to the Prince who made them; yet Sir *Robert Filmer* tells us expreſly; *The Laws, Ordinances, Letters, Patents, Priviledges, and Grants of Princes, have no Force but during their Life, if they be not ratified by the expreſs Conſent, or at leaſt by the ſufferance of the Prince following, who had knowledg thereof.* *Vid.* Power of Kings, *f.* 1.

Theſe

These Notions have more Favourers perhaps, than there are Men of Judgment or Honesty enough to shew the weakness of them. Nor has Mr. *Hume*, that I know of, directly encountred them with his two-edg'd Weapon; But if the supposed Fact which they are built upon, be prov'd to be no more than Supposition, all the most specious Superstructures are but Castles in the Air, which vanish like Smoak.

Inter

¶ Inter Communia brevia de Termino *Michaelis*, *Anno* 34. *Edw.* 1.

Inter Record penes Rem. Dnū Thes. in ſcio remanend. pro hominibus Ville de *Coventre.*

Et parte eorundem hominum Regi eſt oſtenſum quod cum Villa prædicta Civitas, Burgus, ſeu Dominicum Regis, non exiſtat, ut homines Ville prædicte tanquam Cives, Burgenſes, ſeu Tenentes de Domino Regis in aliquibus auxiliis, tallagiis, ſeu contributionibus Regi, ſeu progenitoribus ſuis conceſſis taxari conſueverunt, ſeu talliari, ſed tantum cum Communitate Com. War: Taratores tamen & Collectores XXX & XX in Com. prædicto homines prædictos tanquam Burgenſes taxari & XXX de bonis & rebus ſuis ad opus Regis levare nituntur, in ipſorum hominum dampnum non modicum, & gravamen, & depauperationem manifeſtam. Et quia Rex non vult quod iidem homines indebite pregraventur in hac parte mandat Baronibus quod ſcrutatis Rotulis & Memorandis de conſimilibus taxationibus factis in Villa prædicta tam tempore Regis, quam progenitorum ſuorum prædictorum, & ſi eis conſtare poterit evidenter quod prædicta Villa de Coventr', non ſit Civitas, Burgus, aut Manerium de antiquo Dominico Corone Regis, ut prædictum eſt, & quod

dicti homines ſimul cum aliis extra Civitates Burgos, & Maneria prædicta manentes ad hujuſmodi præſtationem Regi faciendam taxari debeant, & ſemper hactenus taxari conſueverunt, tunc ipſos homines ad præſtationem Regi ratione prædictæ conceſſionis de XXX Regi factæ faciendum per prædictos Taxatores & Collectores diſtringi non permittant, aliter quam totis temporibus retroactis in hujuſmodi caſu fieri conſuevit. Teſte Rege apud Lancetoſt. 18. die Octobris, 34.

FINIS.

ERRATA.

PAge 113. line 3. in Marg. read *true way*. P. 117. l. 18. r. *Bannertts*. lb. l. 21. r. *Bauntrt*. P. 122. l. 2. r. St. P. 144. l. 8. r. *ingenuuſſy*, So P. 145. l. 31. P. 160. l. 5 *after the Word Barony add in the Margine*, viz. *Eccleſiaſtical Perſons*. P. 174. *or* 274. Tl. 18. r. *done*. P. 204. Vl. 2. r. *Counſel*. So l. 11. lb. P. 211. Xl. 22. r. *permixtim*, P. 217. Xl. 26. r. *de tout le*, &c. P. 220. l. 6. r. *taken*.

Other Literal Miſtakes the Reader is deſired to correct with his Pen.

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